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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 146

CLIFTON MANUFACTURING COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 3, 1934

CERTIORARI GRANTED OCTOBER 8, 1934

SUPREME COURT OF THE UNITED STATES

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[fols. a & 1] Caption omitted

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA, SPARTANBURG DIVISION

At Law. No. 1498

CLIFTON MANUFACTURING COMPANY, a Corporation,

v.

THE UNITED STATES

PETITION

[fol. 2] To the District Court of the United States for the Western District of South Carolina, Spartanburg Division:

The plaintiff, Clifton Manufacturing Company, a corporation, respectfully shows to this Honorable Court and alleges:

1

That this petition is brought under Section 24(20) of the Judicial Code (28 U. S. C. Section 41(20)) to recover certain income and excess profits taxes and interest thereon, erroneously and illegally assessed and collected under the Internal Revenue Laws of the United States.

2

That at all times hereinafter mentioned the Plaintiff was and still is a domestic corporation organized and existing under the laws of the State of South Carolina, with its principal office and place of business at Clifton, Spartanburg County, in the Spartanburg Division of the Western District of South Carolina.

3

Defendant is indebted to Plaintiff in the principal sum of $162,805.61 with interest at 6% per annum on $1,665.96 from September 15, 1926 and on $161,139.65 from October 16, 1926.

Statutes Involved

4

The claim of Plaintiff here sued on is founded on the following statutes:

As to the statute of limitations, Revenue Act of 1918 (40 Stat. 1057), Sec. 250(d), Revenue Act of 1921 (42 Stat. 227), Sec. 250(d), Revenue Act of 1924 (43 Stat. 253), Sec. 277(a)(2), Sec. 278(d) and (e), Revenue Act of 1926 (44 Stat. 9), Sec. 277(a)(3), Sec. 278(d) and (e); as to re-[fol. 3] turns starting the running of the statute, Revenue Act of 1916 (as amended by Revenue Act of 1917) (39 Stat. 756, 40 Stat. 300), Sec. 13(b), Revenue Act of 1917 (40 Stat. 300), Sec. 212, Revenue Act of 1918 (40 Stat. 1057), Sec. 205(a), Sec. 200, Sec. 335(a), Sec. 300, Sec. 241(a), Sec. 227(a), Sec. 239(a), Sec. 336; as to effect of payment after expiration of statute of limitations, Revenue Act of 1928 (45 Stat. 795), Sec. 607.

5

The claim of Plaintiff here sued on is also founded in part upon Treasury Decision 2797, promulgated on the 11th day of March, 1919, which provides:

"If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the Revenue Act of 1917, and is subject to additional tax for the same period under the revenue act of 1918, the return covering such additional tax shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the original return and additional tax due under amended return, will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918."

Statement of Facts

6

On May 28, 1918 Plaintiff filed with the Collector of Internal Revenue for the District of South Carolina its income tax return on Form 1031 and its excess profits tax return on Form 1103, for the fiscal year ended March 31, 1918, both of which were duly executed and verified by Plaintiff in accordance with law.

[fol. 4] 7

The schedule which is attached to this petition marked "Exhibit A" sets forth the principal information which was contained in the income tax return, on Form 1031, referred to in Paragraph 6.

8

The schedule which is attached to this petition marked "Exhibit B" sets forth the principal information which was contained in the excess profits tax return, on Form 1103, referred to in Paragraph 6.

9

The income and excess profits taxes shown by said returns, referred to in Paragraph 6, amounting to $171,002.96, were paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina on September 11, 1918.

10

Pursuant to the requirement of Treasury Decision No. 2797 (dated March 11, 1919) Plaintiff on April 29, 1919 filed with the Collector of Internal Revenue for the District of South Carolina an amended income and profits tax return, on Form 1120, for the fiscal year ended March 31, 1918.

11

The amended return referred to in Paragraph 10 contained the same information with reference to the amount of net income and invested capital for the pre-war years (1911, 1912 and 1913), and the same information with

reference to the amount of invested capital for the fiscal year ended March 31, 1918, as was contained in the original income and profits tax returns, referred to in Paragraph 6. The amount of net income for the taxable year, the fiscal year ended March 31, 1918, was shown in the [fol. 5] amended return, referred to in Paragraph 10, to be the sum of $652,402.72, which sum was also shown to be the amount of net income subject to excess profits tax in the excess profits tax return referred to in Paragraph 6. The total net income shown to be subject to income tax on the income tax return referred to in Paragraph 6 was $652,525.30, which amount exceeded the amount shown as taxable net income in the amended return, referred to in Paragraph 10, by the sum of $122.58.

12

The said sum of $122.58, referred to in Paragraph 11, as the amount by which the item of taxable net income shown in the original income tax return referred to in Paragraph 6, exceeds the item of taxable net income shown in the amended return referred to in Paragraph 10, represented the amount paid by the taxpayer during the taxable year as interest on money borrowed for the purchase of Liberty bonds. This sum, with the explanation thereof, is shown in "Schedule 6" on the "Supplementary Statement" attached to the income tax return referred to in Paragraph 6. It also appears in "Schedule I" of the original excess profits tax return, referred to in Paragraph 6, that this amount of $122.58, representing interest paid on indebtedness incurred for the purchase of obligations of the United States issued since September 24, 1917, and held by the corporation in excess of $5,000.00 par value, was deducted from net income for the taxable year as shown in the original income tax return referred to in Paragraph 6, in order to arrive at the amount of net income subject to excess profits tax.

13

The amended return, referred to in Paragraph 10, showed an additional tax of $50,638.75 over and above the taxes shown on the original returns, referred to in Paragraph 6, which additional tax resulted solely from the application of the revised rates provided by the Revenue

Act of 1918, which was enacted after the original returns, referred to in Paragraph 6, were filed.

[fol. 6]

14

The additional tax in the sum of $50,638.75, referred to in Paragraph 13, was paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina, $13,690.65 on March 21, 1919 and $36,948.10 on September 15, 1919.

15

The original income and excess profits tax returns, referred to in Paragraph 6, were filed with the Collector of Internal Revenue for the District of South Carolina within the period provided by Section 241(a) and Section 227(a) of the Revenue Act of 1918 and Section 13(b) of the Revenue Act of 1916 and Section 212 of the Revenue Act of 1917.

16

The original income and excess profits tax returns, referred to in Paragraph 6, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912 and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918 and the Revenue Act of 1917 and the Revenue Act of 1916 as amended, provided that the items referred to should be accepted by the Commissioner as correct.

17

Said original income and excess profits tax returns, referred to in Paragraph 6, were prepared and filed by Plaintiff in good faith and in the honest belief that all the information therein contained was correct, and in particular that said returns accurately reflected all facts necessary to a proper computation of the income and excess profits taxes due by it for the fiscal year ended March 31, 1918, [fol. 7] including the items of gross income, deductions, credits, net income and invested capital for the fiscal year

ended March 31, 1918 and for the pre-war period (1911, 1912 and 1913).

18

All of the additional assessments referred to in the succeeding paragraphs were due to corrections made by the Commissioner of Internal Revenue in the income and invested capital reported in good faith by the Plaintiff in its original returns, referred to in Paragraph 6, and all of said additional assessments could have been made just as easily upon the basis of the figures contained in its original returns, referred to in Paragraph 6, as upon the basis of the figures contained in its amended return, referred to in Paragraph 10.

19

An additional assessment of $3,762.86 against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 was made by the Commissioner of Internal Revenue in June, 1919, and was paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina on June 16, 1919.

20

In May, 1921 the Commissioner of Internal Revenue assessed against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 an additional amount of $102,420.26.

21

On March 15, 1923 the sum of $1,124.35 was paid on account of the additional assessment, referred to in Paragraph 20, by means of the application of a credit of taxes overpaid by Plaintiff for the fiscal year ended March 31, 1917.

22

On May 25, 1926 the Commissioner of Internal Revenue [fol. 8] advised Plaintiff that he had finally determined that Plaintiff's income and excess profits tax liability for the fiscal year ended March 31, 1918 was $365,138.23, and in September, 1926 the Commissioner of Internal Revenue assessed against Plaintiff for the fiscal year ended March 31, 1918 an additional income and excess profits tax in the

principal sum of $37,313.46, and interest thereon of $1,174.61, or a total of $38,488.07.

23

On September 15, 1926 the sum of $1,665.96 was paid on account of the additional assessment, referred to in Paragraph 20, by means of the application of a credit of taxes overpaid by Plaintiff for the fiscal year ended March 31, 1917.

24

On September 24, 1926 the Collector of Internal Revenue for the District of South Carolina demanded of Plaintiff on account of said assessment in May, 1921, referred to in Paragraph 20, the sum of $99,629.95 principal, and interest thereon at 6% per annum from July 8, 1921 to September 24, 1926, in the sum of $31,147.32, making a total of $130,777.27.

25

The sums referred to in Paragraph 24 were paid by Plaintiff to said Collector under written protest, and under threat of distraint by said Collector, on October 15, 1926.

26

On September 28, 1926 said Collector demanded of the Plaintiff the amount of the additional assessment of principal and interest, referred to in Paragraph 22.

27

The sums referred to in Paragraph 26 and Paragraph 22 were paid by Plaintiff to said Collector under written [fol. 9] protest, and under threat of distraint by said Collector, on October 15, 1926.

28

On or about October 24, 1929 the Commissioner of Internal Revenue issued a certificate of overassessment in the sum of $7,877.78 principal, and $247.91 interest, or a total of $8,125.69, which sum, together with interest thereon, was refunded to plaintiff. Said refund was made out of, or with respect to, the additional assessment of principal and interest, referred to in Paragraph 22, which said assess-

ment was paid by Plaintiff to said Collector on October 15, 1926, as described in Paragraph 27.

29

The additional assessment, referred to in Paragraph 22, was made more than five years after Plaintiff's original income and excess profits tax returns, on Forms 1031 and 1103 respectively, for the fiscal year ended March 31, 1918 were filed, as stated in Paragraph 6, and after the statute of limitations had barred the right of the Commissioner of Internal Revenue to make such an assessment, and the collection on October 15, 1926 of $37,313.46 principal, and $1,174.61 interest, or a total of $38,488.07, as described in Paragraph 27, was made after the statute of limitations had barred the right of said Collector and the Government to make such collection.

30

The collection of additional income and excess profits taxes for the fiscal year ended March 31, 1918 in the sum of $99,629.95 principal, and interest thereon in the sum of $31,147.32, on October 15, 1926, as described in Paragraphs 24 and 25, was made after the statute of limitations had barred the right of said Collector and the Government to make such collection.

31

After deducting from the amounts of principal ($37,-[fol. 10] 313.46) and interest ($1,174.61), alleged in Paragraph 29 to have been collected after the expiration of the statute of limitations, the amounts of principal ($7,877.78) and interest ($247.91) refunded therefrom, as set forth in Paragraph 28, there remains a balance of $29,435.68, principal, and $926.70, interest, or a total of $30,362.38, which is refundable under Section 607 of the Revenue Act of 1928, together with interest thereon at 6% per annum from the date of payment, to-wit, October 15, 1926.

32

On September 19, 1928 Plaintiff filed with said Collector a claim for refund of the taxes here sought to be recovered. Copy of said claim for refund is attached hereto, marked "Exhibit C".

33

The claim for refund referred to in Paragraph 32 was rejected and disallowed by the Commissioner of Internal Revenue on October 24, 1929.

34

Anticipating the possibility of an attempted defense of "waiver" to the cause of action set out in the foregoing paragraphs, and without admitting the existence of any valid waivers which might afford even a defense at law to this action, Plaintiff in reply shows the following facts with reference to certain purported waivers, which facts would entitle Plaintiff to equitable relief against the use of said instruments by the Defendant in this action, if they should be held to constitute a valid defense at law.

35

On June 21, 1923, which was more than five years after the returns described in Paragraph 6 were filed by Plaintiff with the Collector of Internal Revenue for the District of South Carolina, the Commissioner of Internal Revenue, through his agents and assistants, to-wit, J. G. Bright, Act-[fol. 11] ing Deputy Commissioner, and John G. Remey, Chief of Section, addressed and sent a letter to Plaintiff enclosing a form of waiver and requesting the execution of said instrument by Plaintiff. Copy of said letter is attached to this petition and made a part hereof, marked "Exhibit D".

36

In said letter of June 21, 1923 the Commissioner of Internal Revenue by and through his agents represented to Plaintiff that the statute of limitations on assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had not yet expired, said representation being impliedly and obviously contained in the following language taken from the said letter, to-wit:

"Reference is made to the proposed additional assessment in the amount of $74,876.74 for the year 1918, as outlined in office letter dated March 5, 1923.

"You are advised that in order that the interests of the Government may not be jeopardized, pending consideration

of your brief dated March 15, 1923, you are hereby requested to fill out and properly execute the enclosed form of waiver and return the same to this office within thirty days from the date of this letter."

37

The representation described in the preceding paragraph was false and misleading, since the statute of limitations on assessment and collection of income and excess profits taxes against and from Plaintiff for Plaintiff's fiscal year 1918 had already expired, at the time said representation was made.

38

The false and misleading representation which the Commissioner of Internal Revenue made to Plaintiff, as described in the preceding paragraphs, was made with the in-
[fol. 12] tention and purpose of causing the Plaintiff or someone in its behalf to execute the so-called "Form of Waiver" which was enclosed with said letter.

39

The letter described in the preceding paragraphs, together with the so-called "Form of Waiver" which was enclosed therewith, was promptly received by Plaintiff; and relying upon the false and misleading representation contained in said letter as described above, and as a direct and proximate effect thereof, one J. C. Evins, President and Treasurer of Plaintiff, purported to execute on behalf of Plaintiff the so-called "Form of Waiver", which had been prepared by the Commissioner of Internal Revenue and which had been enclosed with the letter described above. Said purported waiver bears the date of June 25, 1923. Copy of said purported waiver is attached to this complaint, marked "Exhibit E".

40

Neither Plaintiff nor the said J. C. Evins nor any of Plaintiff's agents knew of the falsity of the representation described above; and Plaintiff and its officers, including the said J. C. Evins, by reason of Plaintiff's relations with the Commissioner of Internal Revenue and his assistants,

deputies and agents, were entitled to rely upon the representations of the Commissioner and his assistants, deputies and agents with reference to the assessability and/or collectibility from Plaintiff of income and excess profits taxes for the fiscal year ended March 31, 1918.

41

Assuming that neither the Government nor its officers nor agents knew of the falsity of said representation, the purported waiver which is described above was executed under a mutual mistake which existed in the minds of the officers and agents of both plaintiff and Defendant.

[fol. 13] 42

Said mutual mistake described in the preceding Paragraph was a mistake of fact (a mistake as to the expiration of the statutory period of limitation on assessment and collection of income and excess profits taxes), or at least a mistake concerning the parties' own antecedent and existing private legal rights, duties and/or liabilities, which said antecedent and existing private legal rights, duties and liabilities were to be affected by the execution of said instrument.

43

The mutual mistake described in the preceding Paragraphs was material; and but for said mutual mistake the said J. C. Evins would not have attempted or purported to execute said instrument on behalf of Plaintiff, and Plaintiff would not otherwise have executed or attempted to execute said instrument, and the purported execution of said instrument by the said J. C. Evins resulted solely and proximately from said mutual mistake.

44

As a result of the purported execution of said instrument on behalf of Plaintiff, Plaintiff received no consideration, benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistake.

45

The purported waiver described above was returned to the Commissioner of Internal Revenue by the said J. C.

Evins, with a letter, copy of which letter is attached hereto marked "Exhibit F".

46

On January 12, 1924, the Commissioner of Internal Revenue addressed and sent to Plaintiff another letter request- [fol. 14] ing Plaintiff to execute a second form of waiver which had been prepared by the Commissioner of Internal Revenue and which was enclosed with said letter of January 12, 1924, copy of which letter is attached hereto marked "Exhibit G".

47

Said so-called "Form of Waiver" described in the preceding paragraph was signed under date of January 19, 1924 by the said J. C. Evins, President and Treasurer of Plaintiff, and filed with the Commissioner of Internal Revenue under the circumstances described below. Copy of said purported waiver is attached hereto marked "Exhibit H".

48

On December 3, 1924, the Commissioner of Internal Revenue addressed and sent a letter to the Plaintiff requesting the Plaintiff to execute a third so-called "Form of Waiver", which said form had been prepared by the Commissioner of Internal Revenue and was enclosed with said letter of December 3, 1924, copy of which letter is attached hereto marked "Exhibit I".

49

Two copies of said so-called "Form of Waiver" described in the preceding paragraph were signed under date of December 4, 1924 by the said J. C. Evins, and filed with the Commissioner of Internal Revenue under the circumstances described below. Copies of said purported waivers are attached hereto marked "Exhibit J" and "Exhibit K".

50

Some time toward the end of the year 1925 the Commissioner of Internal Revenue requested that Plaintiff execute a fourth so-called "Form of Waiver", which had been prepared by the Commissioner. Said so-called "Form of

Waiver" was signed under date of November 18, 1925 by said J. C. Evins, President and Treasurer of Plaintiff, and [fol. 15] filed with the Commissioner of Internal Revenue under the circumstances described below. Copy of said purported waiver is attached hereto marked "Exhibit L".

51

The said J. C. Evins, President and Treasurer of Plaintiff corporation, purported to execute all four of said waivers described in Paragraphs 47, 49 and 50 above, on behalf of Plaintiff in reliance upon, and as a direct and proximate result of, the misrepresentation and mutual mistake described in Paragraphs 36 to 44 inclusive, and in reliance upon, and as a direct and proximate result of a further mistake, which said further mistake is described in the following Paragraph.

52

At the time of the execution of each of the four waivers described in Paragraphs 47, 49 and 50 above, Plaintiff and its officers and agents, including the said J. C. Evins, on the one hand, and the Commissioner of Internal Revenue and his deputies and assistants and agents on the other hand, mistakenly believed that the statute of limitations on assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had not yet expired, and they mistakenly believed that each of the preceding waivers described above had been validly obtained and executed, and they were ignorant of the voidability or invalidity of each or any of the preceding waivers.

53

But for said misrepresentation and mutual mistakes described in the two preceding Paragraphs, the said J. C. Evins would not have undertaken to execute said instruments referred to in Paragraphs 47, 49 and 50 above, or any one of them, on behalf of Plaintiff.

54

Plaintiff did not receive as a result of the purported [fol. 16] execution of any one of the four instruments described in Paragraphs 47, 49 and 50 any consideration,

benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistake.

55

Neither Plaintiff nor its officers or agents discovered the falsity of the representations described in Paragraphs 36 to 40 inclusive, above, nor did Plaintiff or its officers or agents become aware of the mutual mistake under which Plaintiff and the Government labored, as described in Paragraphs 41 to 44, inclusive, and in Paragraphs 51 and 52 above, until after the signing and filing by J. C. Evins, President and Treasurer of Plaintiff, of the last of the five instruments described in Paragraphs 39, 47, 49 and 50 above.

56

At the time of the filing and signing by J. C. Evins, President and Treasurer of Plaintiff, of each of the "Forms of Waiver" referred to in Paragraphs 39, 47, 49 and 50 above, none of said "Forms of Waiver" bore any signature on behalf of the Commissioner of Internal Revenue, and Plaintiff makes no admission as to the genuineness of the purported signature of the Commissioner appearing thereon, or the date it was affixed, or the authority of the party who might have affixed it on behalf of the Commissioner; and if any of the preceding "Forms of Waiver" had not been properly executed on behalf of the Commissioner of Internal Revenue at the time the later "Forms of Waiver" referred to in Paragraphs 47, 49 and 50 were signed and filed by J. C. Evins, President and Treasurer of Plaintiff, Plaintiff and the said J. C. Evins were ignorant of that fact.

57

The said J. C. Evins, President and Treasurer of Plaintiff, had no authority to execute any one of the five instruments described in Paragraphs 39, 47, 49 and 50 above, at the time he undertook to execute said instruments on behalf of Plaintiff. No express authority was given to the [fol. 17] said J. C. Evins by Plaintiff or its board of directors to execute any one of said instruments in Plaintiff's name, and said J. C. Evins had no implied authority for such action by virtue of his office, course of dealing or any acts or omissions of the Plaintiff, for the reason that

the statute of limitations applicable to assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had already expired when the first of said instruments was executed, and for the further reason, with reference to the four instruments described in Paragraphs 47, 49 and 50, that the preceding alleged waiver or waivers, each and all of them, were void or voidable and could not therefore be used to defeat the rights which had accrued to Plaintiff from the expiration of the statute of limitations.

58

Plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States.

59

No part of said claim of $162,805.61 and interest due Plaintiff thereon has ever been assigned or transferred by Plaintiff, and Plaintiff is entitled to the entire amount thereof after allowing all just credits and offsets due to the United States. Plaintiff believes the facts as stated in this petition to be true.

Wherefore, Plaintiff prays judgment against the United States for the sum of $162,805.61, or such other amount or amounts as the Court may find to be due, representing income and profits taxes assessed and/or collected after the running of the statute of limitations, as above set out, together with interest from the dates of payment at the rate of 6% per annum, as provided by law, together with the costs of this suit, and further prays that in the event all or any one of the five instruments described in Paragraphs 39, 47, 49 and 50 should be found to constitute a defense in [fol. 18] law to this action, the Court decree that they and each of them are void, and that they cannot be employed by Defendant as a defense to this action, and for such other and further relief as may be necessary or proper.

Clifton Manufacturing Company, by (Sgd.) J. C. Evins, President and Treasurer. Sutherland & Tuttle, Atlanta, Georgia; Horace L. Bomar, Spartanburg, South Carolina, Attorneys for Plaintiff.

Duly sworn to by J. C. Evins. Jurat omitted in printing.

[fol. 19] EXHIBIT "A" TO PETITION

Form 1031 (Revised January, 1918)—United States Internal Revenue

Corporation Income Tax Return

* * * * * * *

Return of annual net income for the fiscal year ended March 31, 1918.

Name of corporation: Clifton Manufacturing Company.

Principal office: Clifton, South Carolina.

Kind of business carried on: Manufacture of cotton goods.

Date of organization: 1880.

1. Total amount of paid up capital stock outstanding at the close of the year, or if there is no capital stock the capital other than interest bearing indebtedness employed in the business at the close of the year. Unissued or treasury stock must not be included in this item, but only stock actually issued and outstanding at the close of the year for which this return is made.

(a) Paid up "common stock"	$1,000,000.00
(b) Paid up "Preferred Stock"	
Total paid up stock	$1,000,000.00

2. Total amount of bonded or other interest bearing indebtedness outstanding at the close of the year, exclusive of indebtedness wholly secured by collateral the subject of sale or hypothecation in the ordinary business of the Company and exclusive also of indebtedness incurred in the purchase of securities, the income from which is not subject to income tax.

Character of Obligation:

Notes to Banks etc. for money borrowed:

Rate of interest	6 and 7%
Principal	$400,282.00
Total Indebtedness	$400,282.00

[fol. 20] Income

3. (a) Gross sales and other income from operations	$3,550,443.03
(b) Income from rentals, royalties, etc	10,096.91
(c) Income from interest	.....
(d) Income from dividends	.....
(e) Income from other sources (See Item 3 (e) on back)	8,258.28
Total gross sales and other income	$3,568,798.22
Less Total Deductions	2,916,272.92
8. Total net income	$652,525.30
Less:	
(a) Excess profits tax (Item 12)	140,267.49
9. (a) Amount taxable at 2%	$512,257.81
10. Amount of total net income shown in Item 8	652,525.30
Less Excess profits tax	140,267.49
11. Amount taxable at 4%	$512,257.81

Deductions

4. (a) Cost of goods and other property sold	$2,589,687.98
(b) Expenses, general	174,022.67
5. (a) Losses sustained charged off	None
(b) Depreciation charged off	86,800.00
(c) Depletion charged off	None
6. (a) Interest paid	51,578.63
(c) Interest paid on indebtedness wholly secured by collateral	None
7. (a) Domestic Taxes paid, not including income and excess profits taxes	14,183.64
(b) Foreign taxes paid	None
Total Deductions	2,916,272.92

[fol. 21] Tax

12. Amount of excess profits tax	$140,267.49
13. Amount of 2% tax	10,245.16
14. Amount of 1% tax	None
15. Amount of 4% tax	20,490.31
16. Total tax assessable	$171,002.96

We, the undersigned, president and treasurer of the above named Company, whose return of net income is hereby set forth being severally duly sworn, each for himself, deposes and says that the items entered in the foregoing report and in the supplementary statement and in any additional list or lists attached to or accompanying this return are, to his best knowledge and belief true and correct in each and every particular.

(Sgd.) J. C. Evins, President. (Sgd.) D. K. Anderson, Sect.

Sworn to and subscribed before me this 25 day of May 1918. (Sgd.) H. K. Osborne, Notary Publ. S. C. (Seal.)

* * * * * * *

Supplementary Statement

* * * * * * *

3. (e) From other sources.

Income received from all sources not elsewhere specified should be itemized below:

Merchandise stores, net profit	$5,804.54
Farm, net profit	2,453.74
Total	$8,258.28

[fol. 22] 4. (a) Cost of goods and other property sold.

Report the cost of goods sold in the following form:

Merchandise bought for sale	.....
Cost of manufacturing or otherwise producing goods	$2,318,717.94
Plus inventories at beginning of year	99,585.89
Total	$3,310,303.83
Less inventories at end of year	720,615.85
Net cost of goods sold	$2,589,687.98

* * * * * * *

EXHIBIT "B" TO PETITION

Form 1103—United States Internal Revenue

Corporation Excess Profits Tax Return, Taxable Year Ended March 31, 1918

Name: Clifton Manufacturing Company.
Business Address: Clifton, South Carolina.
Kind of Business: Manufacturing Cotton Goods.
Date Established: 1880.

* * * * * * *

Schedule I—Net Income for Taxable Year Subject to Excess Profits Tax

1. Net income for taxable year shown in Item 8, Form 1031	$652,525.30
2. Plus interest on obligations of the United States issued since September 24, 1917, held by corporation in excess of $5,000.00 par value	.....
3. Total	$652,525.30
4. Less (a) Dividends received	.....
5. (b) Interest paid (not in excess of legal limit) on indebtedness incurred for purchase of obligations reported in Item 2 above	122.58
6. Net income subject to excess profits tax	$652,402.72

[fol. 23] Schedule II—Invested Capital

Item	1911	1912	1913	Taxable Year
1. Capital, surplus, and undivided profits at close of the preceding year as shown by Corporation's books before making any adjustments therein (From Schedule A).....	1,477,971.76	1,614,575.31	1,717,137.14	1,939,857.07
2. Adjustments by way of additions (From Schedule B).....	356,590.03	356,590.03	356,590.03	356,590.03
3. Total.....	1,834,561.79	1,971,165.34	2,073,727.17	2,296,447.10
4. Adjustments by way of deductions (From Schedule C).....	.....	.....	.....	.....
5. Invested Capital at beginning of year (Item 3 less Item 4)....	.....	.....	.....	2,296,447.10
6. Changes in invested capital during year (From Schedules D and E)..	.....	.....	.....	.....
7. Invested capital for year.....	1,834,561.79	1,971,165.34	2,073,727.17	2,296,447.10
8. Total invested capital for pre-war period.....	.....	.....	.....	5,879,454.30

* * * * * * *

[fol. 24] Schedule A—Capital Surplus and Undivided Profits as Shown by Books Before Making Any Adjustments Therein

* * * * * * *

Item	1911	1912	1913	Taxable Year
Capital stock paid up and actually outstanding at the close of the preceding year (not including treasury stock):				
1. First preferred	300,000.00	300,000.00	300,000.00	.....
2. Second preferred	.....	.....	.....	.....
3. Common	1,000,000.00	1,000,000.00	1,000,000.00	1,000,000.00
4. Total	1,300,000.00	1,300,000.00	1,300,000.00	1,000,000.00
Surplus and undivide profits:				
5. Paid in surplus	.....	.....	.....	.....
6. Earned surplus	.....	.....	.....	.....
7. Undivided profits	177,971.76	314,575.31	417,137.14	939,857.07
8. Grand total of Items 4, 5, 6 and 7	1,477,971.76	1,614,575.31	1,717,137.14	1,939,857.07

[fol. 25] Schedule B—Adjustments by Way of Additions

* * * * * * *

Item	1911	1912	1913	Taxable Year
3. Additions to capital account allowable under Article 64	356,590.03	356,590.03	356,590.03	356,590.03

* * * * * * * *

Schedule F—Net Income During Pre-War Period

Item	1911	1912	1913
1. Net income for year as reported on income tax return	33,568.30	215,585.32	143,737.51
2. Plus amount of federal income tax paid during year	22.73	2,455.12	1,116.80
3. Total for each year	33,591.03	218,040.53	144,854.31
4. Less amount of dividends received in 1913	.....	.....	.....
5. Net total for year 1913	.....	.....	144,854.31
6. Grand total for pre-war year	.....	.....	396,485.87

* * * * * * *

We, the undersigned, president and treasurer of the above-named company, being severally duly sworn, each for himself deposes and says that the foregoing return, including the accompanying schedules and statements (if any), has been examined by him and is to the best of his knowledge and belief a true and complete return made in [fol. 26] good faith pursuant to the Excess Profits Tax Regulations.

J. C. Evins, Pres. D. K. Anderson, Sect.-Treasurer.

Sworn to and subscribed before me this 25 day of May, 1918. (Sgd.) H. K. Osborne, Notary Public, S. C. (Seal.)

EXHIBIT "C" TO PETITION

Treasury Department, Internal Revenue Service

Form 843

Claim for Refund of Taxes Illegally Collected

STATE OF SOUTH CAROLINA,
County of Spartanburg:

(Name of Taxpayer:) Clifton Manufacturing Company.
(Business Address:) Clifton, South Carolina.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: Manufacturers of Cotton Cloth (From April 1, 1917).

2. Character of assessment or tax: (To March 31, 1918).

3. Amount of assessment or stamps purchased: $365,-138.23 plus 32,321.93 int.

[fol. 27] 4. Reduction of Tax Liability requested (Income and Profits Tax): —.

5. Amount to be abated: —.

6. Amount to be refunded (or such greater amount as is legally refundable): $175,000.00.

7. Dates of payment (See Collector's receipts or indorsements of canceled checks): $225,404.57—1918-1919. Prin. $99,629.95 int. 31,147.32. 10/5/26. Prin. $37,313.46 int. 1,174.61 Oct. 8, 1926.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed: Columbia Division.

9. District in which unpaid assessment appears: South Carolina.

10. Amount of overpayment claimed as credit:

11. Unpaid assessment against which credit is asked; period from —— Deponent verily believes that this application should be allowed for the following reasons:

1. Commissioner erred in disallowing Taxpayer's claim that its inventory be taken at cost or market whichever is lower instead of at cost, thus overstating taxpayer's income for the year 1919.

2. All of the amounts collected in October 1926 were collected more than five years after taxpayer's original return for the fiscal year ended after March 31, 1918 had been filed and after the Statute of Limitations on collection of said amounts had become operative.

3. The tax collected on Oct. 8, 1926 as above stated was assessed more than five years after taxpayer's original return for the fiscal year ended March 31, 1918 had been filed [fol. 28] and after the Statute of Limitations on said assessment had become operative.

Clifton Manufacturing Company. (Sgd.) J. C. Ivins, Treasurer. (Seal.)

Sworn to and subscribed before me this 19th day of Sept., 1928. (Sgd.) James M. Oeland, N. P. for S. C. (Seal.)

EXHIBIT "D" TO PETITION

Treasury Department, Washington

Office of Commissioner of Internal Revenue

June 21, 1923.

Address reply to Commissioner of Internal Revenue, and refer to IT:CA:M-2RJR-2112-11.

Clifton Manufacturing Company, Clifton, South Carolina.

SIRS: Reference is made to the proposed additional assessment in the amount of $74,876.74, for the year 1918, as outlined in office letter dated March 5, 1923.

You are advised that in order that the interests of the Government may not be jeopardized, pending consideration of your brief dated March 16, 1923, you are hereby requested to fill out and properly execute the enclosed form [fol. 29] of waiver and return the same to this office within thirty days from the date of this letter.

In your letter of transmittal, reference should be made to IT:CA:M-2-RJR-2112-11.

Respectfully, J. G. Bright, Acting Deputy Commissioner, by (Sgd.) John G. Remey, Chief of Section.

Enclosure: Form of Waiver.

EXHIBIT "E" TO PETITION

(872M.)
IT:CA:M-2.
2112: RJR 11.
(23.)

Clifton, S. C.,
June 25, 1923.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Clifton Mfg. Co., of Clifton, S. C. and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Clifton Mfg. Co. for the years 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

Clifton Mfg. Co., Taxpayer (Seal), by (Sgd.) J. C. Evins, Pres. & Treas, (Sgd.) D. H. Blair, Commissioner.

[fol. 30] If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the cor-

poration as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

EXHIBIT "F" TO PETITION

Clifton Manufacturing Company, Cotton Mills, Clifton, S. C.

Address All Communications To Clifton, S. C.

June 25, 1923.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: Replying to yours of the 21st inst. IT:CA:M-2-RJR-2112-II, as requested we have signed and herewith return waiver covering the adjustment of additional taxes assessed against Clifton Mfg. Co. for the year 1918.

Very truly yours, (Sgd.) J. C. Evins, Pres.

EXHIBIT "G" TO PETITION

Jan. 12, 1924.

IT:CA:M.
MWH-2100-12-App.

Clifton Manufacturing Company, Clifton, South Carolina.

SIRS: Reference is made to your briefs dated March 16, [fol. 31] 1923 and April 6, 1923, protesting against the proposed additional tax for the years 1917 to 1919, inclusive, in the net amount of $28,864.66, as outlined in office letter to you dated March 5, 1923.

You are informed that before your briefs can be given further consideration, it will be necessary for you to execute and return to this office immediately, the enclosed form of waiver, covering the fiscal years ended March 31, 1917 and March 31, 1918, properly signed by two of the principal officers of the corporation, and the corporate seal affixed thereto.

In the event that you fail to take action as above outlined within ten days from the date of this letter, the additional

taxes, disclosed by office letter dated March 5, 1923, for the years 1917 to 1919, inclusive, will be immediately assessed.

If waivers are not furnished within the time prescribed, and the assessment is placed upon the list, payment thereof should be made promptly upon receipt of notice and demand from the Collector of Internal Revenue for your district, as the provisions of Section 250(d) of the Revenue Act of 1921 and Article 1006 of Regulations 62, deny to a taxpayer the privilege of filing a claim for abatement under such circumstances.

Please give this matter your prompt attention, referring in your reply to IT:CA:M MWH-2100-12-App.

Respectfully, J. G. Bright, Deputy Commissioner, by —— ——, Chief of Section.

Enclosures: 2 Waiver Forms.

lfc-5.

[fol. 32] EXHIBIT "H" TO PETITION

1/19/24.

Income and Profits Tax Waiver

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, the Clifton Manufacturing Company, of Clifton, S. C., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said corporation for the fiscal year ended March 31, 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

Clifton Manufacturing Company, Taxpayer (Seal), (Sgd.) J. C. Evins, Pres. & Treas. (Sgd.) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 33] EXHIBIT "I" TO PETITION

Treasury Department, Internal Revenue Bureau

Income Tax-Form 7768.
Dec., 1921 c2-11662.
IT:E:SM.
TGF-14149.
A-14150.
B-14151.

Dec. 3, 1924.

Clifton Manufacturing Company, Clifton, South Carolina.

SIRS: Reference is made to your income and profits tax returns for the fiscal years ended March 31, 1917, 1918 and 1919 and to your application for assessment under the provisions of Sections 210 and 328 of the Revenue Acts of 1917 and 1918.

Inasmuch as the audit of your case, under the above mentioned provisions, is practically completed and the waivers now on file do not give sufficient time to comply with the provisions of Section 274(a) of the Revenue Act of 1924, it is requested that the enclosed waiver forms for the taxable years 1917, 1918 and 1919 be properly executed and returned to this office within ten days from the date of this letter.

In your letter of transmittal please refer to the symbols IT:E:SM:TGF-14149, A-14150, B-14151.

Respectfully, J. G. Bright, Deputy Commissioner.
By (Sgd.) I. T. Enes, Chief of Section.

EP-6
Enclosures:
Waiver forms.

[fol. 34] EXHIBIT "J" TO PETITION

As Amended 1924.
IT:E:SM.
TGF-14149.
A-14150.
B-14151.

Clifton, S. C.,
Dec. 4, 1924.

Income and Profits Tax Waiver.

In pursuance of the provisions of existing Internal Revenue Laws, Clifton Manufacturing Company a taxpayer of Clifton, South Carolina and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years March 31, 1917, 1918 and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

Clifton Mfg. Co., Taxpayer (Seal), by (Sgd.) J. C. Evins, Treas. (Sgd.) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 35] EXHIBIT "K" TO PETITION

(1435M.)
As amended 1924.

December 4, 1924.

Income and Profits Tax Waiver

In pursuance of the provisions of existing Internal Revenue Laws, Clifton Manufacturing Company a taxpayer of Clifton, South Carolina, and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years 1917, 1918 and 1919 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277(b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

Clifton Manufacturing Company, Taxpayer (Seal).
by (Sgd.) J. C. Evins, Treas. (Sgd.) D. H. Blair,
Commissioner. BB.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[fol. 36] EXHIBIT "L" TO PETITION

Treasury Department, Internal Revenue Service

Form 872A.

Income and Profits Tax Waiver for Taxable Years Ended Prior to January 1, 1922

November 18th, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Clifton Manufacturing Company, a taxpayer of Clifton, South Carolina, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the fiscal years ended March 31, 1917, 1918 and 1919 under existing revenue acts, or under the prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Clifton Manufacturing Company, Taxpayer (Seal),
by (Sgd.) J. C. Evins, Pres. & Treas. (Sgd.)
D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addi-
[fol. 37] tion to which, the seal if any, of the corporation must be affixed.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF PETITION

SIRS: Please take notice that the within petition was duly filed with the Clerk of the District Court of the United States for the Western District of South Carolina on the 13th day of October, 1931, which Court has jurisdiction of the cause therein set forth, and in which District the Plaintiff resides.

Spartanburg, South Carolina, October 13th, 1931.

(Sgd.) Horace L. Bomar, Attorney for Plaintiff, Spartanburg, South Carolina.

To the Honorable the Attorney General of the United States and to the Honorable the Attorney of the United States for the Western District of South Carolina.

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 38] AFFIDAVIT OF SERVICE

Personally appeared before the undersigned Horace L. Bomar, who being first duly sworn, deposes and says that he is the Attorney for the Plaintiff in the foregoing suit and that on October 13th, 1931 he personally served on Joseph A. Tolbert, United States District Attorney for the Western District of *North* Carolina, at his office in Greenville, South Carolina, the within contained notice and copy of petition, and that on said October 13th, 1931 he thereupon mailed a copy of said notice and petition to the Attorney General of the United States at Washington, all in the form and manner as required by law.

(Sgd.) Horace L. Bomar, Attorney for Plaintiff.

Sworn to and subscribed before me this 13th day of October, 1931. (Sgd.) Davis C. Durham, Notary Public for S. C. (Seal.)

I hereby acknowledge service of the within contained notice and copy of petition.

This 13 day of October, 1931.

(Sgd.) Joseph A. Tolbert, United States Attorney, Western District of South Carolina.

IN UNITED STATES DISTRICT COURT

[Title omitted]

[fol. 39] AMENDMENT TO PETITION

Now comes the plaintiff in the above entitled cause and, with leave of court first had and obtained, amends its petition heretofore filed by adding after Paragraph 59, and before the prayer for relief, the following new paragraph as Paragraph 60:

"60

"The Collector of Internal Revenue by whom the taxes, interest and sums referred to in Paragraphs 9, 14, 19, 21, 23, 25 and 27 were collected, and to whom said taxes, interest and sums were paid, had ceased to hold said office of Collector of Internal Revenue at the time this suit was commenced."

(Sgd.) Joseph B. Brennan, (Sgd.) W. A. Sutherland, Attorneys for Plaintiff.

Order

The foregoing amendment read and considered. The same is allowed subject to demurrer.

This 22 day of January, 1932.

(Sgd.) H. H. Watkins, United States Judge.

I consent:

Joseph A. Tolbert, U. S. Atty.

IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDMENT TO PETITION

[fol. 40] Now comes the Plaintiff in the above entitled cause, and with leave of Court first had and obtained,

amends the petition heretofore filed in the following respects:

1

Paragraph 43 of the petition is amended so as to read as follows:

"43. The mutual mistake and misrepresentation described in the preceding paragraphs were material; and but for said mutual mistake and misrepresentation the said J. C. Evins would not have attempted or purported to execute said instrument on behalf of Plaintiff, and Plaintiff would not otherwise have executed or attempted to execute said instrument, and the purported execution of said instrument by the said J. C. Evins resulted solely and proximately from said mutual mistake and misrepresentation."

2

Paragraph 51 of the original petition is amended so as to read as follows:

"51. The said J. C. Evins, President and Treasurer of Plaintiff Corporation, purported to execute all four of said waivers described in paragraphs 47, 49 and 50 above, on behalf of Plaintiff, in reliance upon, and as a direct and proximate result of, the misrepresentation and mutual mistake described in paragraphs 36 to 44, inclusive, and in reliance upon, and as a direct and proximate result of further mistakes and misrepresentations, which said mistakes and misrepresentations are described in the following paragraphs."

3

Paragraph 52 of the original petition is amended so as to read as follows:

"52. At the time of the execution of each of the four waivers described in paragraphs 47, 49 and 50 above, Plaintiff and its officers and agents, including the said J. C. [fol. 41] Evins, on the one hand, and the Commissioner of Internal Revenue and his Deputies, Assistants and Agents, on the other hand, mistakenly believed that the statute of

limitations on assessment and collection of income and excess profits taxes for Plaintiff's fiscal year 1918 had not expired, and they mistakenly believed that each of the preceding waivers described above had been validly obtained and executed, and they were ignorant of the voidability or invalidity of each or any of the preceding waivers. Each of the four waivers described in paragraphs 47, 49 and 50 above, were also procured from Plaintiff by means of misrepresentations, which are more fully described in the following sub-paragraphs:

"(a) In the letter of January 12, 1924 (Exhibit G attached to the petition) in which the purported waiver of January 19, 1924 (Exhibit H attached to the petition) was requested, the Commissioner of Internal Revenue, through his Agents, and Assistants, to-wit, J. G. Bright, Acting Deputy Commissioner, and John G. Remey, Chief of Section, represented to Plaintiff that the statute of limitations had not yet expired, said representation being contained in the following language taken from said letter:

You are informed that before your briefs can be given further consideration, it will be necessary for you to execute and return to this office immediately, the enclosed form of waiver, covering the fiscal years ended March 31, 1917 and March 31, 1918, properly signed by two of the principal officers of the corporation, and the corporate seal affixed thereto.

In the event that you fail to take action as above outlined within ten days from the date of this letter, the additional taxes, disclosed by office letter dated March 5, 1923, for the years 1917 to 1919, inclusive, will be immediately assessed.

"(b) The representation described in sub-paragraph (a) was false and misleading since the statute of limitations on assessment and collection of income profits taxes for Plaintiff's fiscal year ended March 31, 1918 had expired and the waiver then on file (Exhibit E attached to the petition) was invalid, at the time said representation was made.

[fol. 42] "(c) In the letter of December 3, 1924 (Exhibit I attached to the petition) in which the purported waiver of December 4, 1924 was requested, the Commissioner of Internal Revenue, through his Agents and Assistants, to-wit, J. G. Bright Deputy Commissioner, and I. T. Enes, Chief of Section, represented to Plaintiff that the statute of

limitations (or the statute as extended by prior waivers) had not yet expired, said representation being contained in the following language taken from said letter:

Inasmuch as the audit of your case, under the above mentioned provisions, is practically completed and the waivers now on file do not give sufficient time to comply with the provisions of Section 274 (a) of the Revenue Act of 1924, it is requested that the enclosed waiver forms for the taxable years 1917, 1918 and 1919 be properly executed and returned to this office within ten days from the date of this letter.

"(d) The representation described in sub-paragraph (c) was false and misleading since the statute of limitations on assessment and collection of income and profits taxes for Plaintiff's fiscal year ended March 31, 1918 had already expired and the waivers then on file (Exhibit E and Exhibit H attached to the petition) were invalid at the time said representation was made.

"(e) The purported waiver dated November 18, 1925 (Exhibit L attached to the petition) was requested from Plaintiff by one Leo Speer, of the Office of the General Counsel, Bureau of Internal Revenue, at a conference in November 1925, upon the representation by said Speer, on behalf of the Commissioner of Internal Revenue and the Defendant, that the statute of limitations (or the statute as extended by prior waivers) had not yet expired.

"(f) The representations described in sub-paragraph (e) were false and misleading since the statute of limitations on assessment and collection of income and profits taxes for Plaintiff's fiscal year ended March 31, 1918 had already expired and the waivers then on file (Exhibits E, H, J and K attached to the petition) were invalid, at the time said representation was made.

[fol. 43] "(g) The misrepresentations described in the preceding sub-paragraphs were made with the intention and purpose of causing Plaintiff to execute the various waivers requested at the time the misrepresentations were made.

"(h) Said mutual mistakes described in paragraphs 36 to 44, inclusive, and in paragraphs 51 and 52 were mistakes of fact, or at least mistakes concerning the parties' own antecedent and existing private legal rights, duties and/or

liabilities, which said antecedent and existing private legal rights, duties and liabilities were to be affected by the execution of said instruments."

4

Paragraph 53 of the original petition is amended so as to read as follows:

"53. Said misrepresentations and mutual mistakes described in paragraphs 36 to 44, inclusive, and in paragraphs 51 and 52 were material, and but for said mutual mistakes and misrepresentations the said J. C. Evins would not have attempted or purported to execute any of the four instruments described in paragraphs 47, 49 and 50 on behalf of the Plaintiff, and Plaintiff would not otherwise have executed or attempted to execute any of said instruments and the purported execution of each of said instruments by the said J. C. Evins resulted solely and approximately from said mutual mistakes and misrepresentations."

5

Paragraph 55 of the original petition is amended so as to read as follows:

"55. Neither Plaintiff nor its officers nor agents discovered the falsity of the representations described in paragraphs 36 to 40, inclusive, and paragraphs 52 above, nor did Plaintiff nor its officers nor agents become aware of the mutual mistake under which the Plaintiff and the Government labored, as described in paragraphs 41 to 44, inclusive, and in paragraphs 41 and 52 above, until after the signing and filing by J. C. Evins, President and Treasurer [fol. 44] of Plaintiff, of the last of the five instruments described in paragraphs 39, 47, 49 and 50 above."

Horace L. Bomar, W. A. Sutherland, Attorneys for Plaintiff.

Order

The foregoing amendment read and considered. Same is allowed subject to demurrer.

This 26 day of October, 1932.

W. H. Watkins, United States Judge.

In United States District Court

Answer

Now comes the defendant through and by Joseph A. Tolbert, United States Attorney for the Western District of South Carolina, and by way of answer to the complaint filed in said cause respectfully shows to this honorable court and alleges:

1

That it is admitted that the petition is filed for the purpose and under the laws as set out and mentioned in paragraph 1 of the petition.

2

That the matters and things set up in the second paragraph of the petition are admitted.

3

That the matters and things set up in the third paragraph are denied.

[fol. 45]

4

That answering the fourth paragraph of the petition the defendant says that said paragraph not being an allegation of fact but a statement of law, it is not called upon either to deny or to affirm the same.

5

That answering the fifth paragraph of the petition, the defendant admits the text of Treasury Decision 2797 as contained in this paragraph to be correct, but defendant avers that it is not called upon to answer to the extent of its application to the claim of the plaintiff.

6

That the allegations of the sixth paragraph of the petition are admitted.

7

That answering the seventh paragraph of the petition it is admitted that the exhibit referred to sets forth the

principal information contained in said return on Form 1031, with the further explanation that the said information is not complete as appears upon said return.

8

That answering the eighth paragraph of the petition it is admitted that Exhibit B, therein referred to, sets forth the principal information which was contained in the excess profits tax return on Form 1103, with the further explanation that the same is incomplete as appears thereon.

9

That the matters and things set forth in the ninth paragraph of the petition are admitted to be true.

10

That the matters and things set forth in the tenth paragraph of the petition are admitted to be true.

[fol. 46] 11

That the matters and things set forth in the eleventh paragraph of the petition are admitted to be true.

12

That answering the matters and things set forth in the twelfth paragraph of the petition it is admitted that the course alleged to have been pursued in reference to the sum of $122.58 would have resulted in the outcome set forth and described in said paragraph.

13

That answering the thirteenth paragraph of the petition it is admitted that the increased rates of the Revenue Act of 1918 would have had the effect on the tax due as set out and alleged in said paragraph, based upon the return made by the plaintiff.

14

That the matters and things set forth in the fourteenth paragraph of the petition are admitted.

15

That the matters and things set forth in the fifteenth paragraph of the petition are admitted.

16

That in answering the matters and things contained in the sixteenth paragraph of the petition it is admitted that if the Commissioner had accepted as correct and accurate the income and excess profits returns filed by the plaintiff, as alleged, the Commissioner could have computed plaintiff's income and excess profits taxes under the Revenue Act of 1918 definitely and exactly, but it is denied that said returns were complete, accurate and correct, and for that reason it was impossible for the Commissioner of Internal Revenue to arrive at the actual amount of taxes due by plaintiff for the taxable period involved.

[fol. 47] 17

That answering the seventeenth paragraph of the petition, the defendant has no information as to the good faith and honest belief in the filing of said returns other than from the circumstances that said returns were inaccurate and incorrect, and not truly reflecting the actual income of the plaintiff for the period involved.

18

That answering the eighteenth paragraph of the petition, the matters and things therein contained are untrue and therefore denied.

19

That the matters and things alleged in the nineteenth paragraph are admitted to be true.

20

That the matters and things alleged in the twentieth paragraph of the petition are admitted to be true.

21

That the matters and things alleged in the twenty-first paragraph of the petition are admitted to be true.

22

That the matters and things alleged in the twenty-second paragraph of the petition are admitted to be true.

23

That the matters and things alleged in the twenty-third paragraph of the petition are admitted to be true.

24

That the matters and things alleged in the twenty-fourth paragraph of the petition are admitted to be true.

[fol. 48] 25

That the matters and things alleged in the twenty-fifth paragraph of the petition are admitted to be true.

26

That the matters and things alleged in the twenty-sixth paragraph of the petition are admitted to be true.

27

That the matters and things alleged in the twenty-seventh paragraph of the petition are admitted to be true.

28

That the matters and things alleged in the twenty-eighth paragraph of the petition are admitted to be true.

29

That answering the allegations of the twenty-ninth paragraph of the petition it is admitted that the said additional assessment referred to in paragraph 22 of the petition was made more than five years after the plaintiff's original income and excess profits tax returns on Forms 1031 and 1103 respectively for the fiscal year ended March 31, 1918 were filed, but as will be more fully explained and set out in the further answer and defense, it is denied that said assessment or the collection of said tax was barred by the statute of limitations applicable thereto.

30

That the allegations contained in the thirtieth paragraph of the petition are untrue and therefore denied.

31

That answering the allegations of the thirty-first paragraph of the petition it is admitted that the computations [fol. 49] therein contained would be correct if based upon proper premises. It is denied that any amount was collected from the plaintiff after the expiration of the period of limitations or that any amount was refundable from the defendant by reason of the allegations contained in the petition.

32

That answering the allegations of the thirty-second paragraph of the petition it is admitted that the plaintiff filed a claim for refund as alleged and that the copy of said claim marked Exhibit C is correct, but it is denied that the same was filed on September 19, 1928, but that it was filed September 20, 1928.

33

That the allegations of the thirty-third paragraph of the petition are admitted to be true.

34 and 35

That answering the allegations of the thirty-fourth and thirty-fifth paragraphs of the petition, which are so correlated as to form one complete allegation, it is admitted that on June 21, 1923, more than five years after the returns described in Paragraph 6 were filed by the plaintiff, the Commissioner of Internal Revenue, through his assistant J. G. Bright, Acting Deputy Commissioner, and through John G. Remey, Chief of Section, addressed and sent a letter to the plaintiff as alleged and that the Exhibit D, referred to, is a correct copy thereof. All other matters and things alleged in said two paragraphs are untrue and therefore denied.

36

That answering the allegations of the thirty-sixth paragraph of the petition it is admitted that the quotation from

the letter therein referred to is correct, but it is denied that there was an obvious or implied representation that the period of limitations applicable to the plaintiff's tax for the fiscal year 1918 had or had not expired, and in further [fol. 50] answer to said allegation the defendant says that plaintiff had filed with the Commissioner of Internal Revenue certain briefs and protests to said tax, and in addition thereto a claim for abatement was pending in reference to a portion of the tax assessed for said period, all of which was well known to the plaintiff, and in addition to that plaintiff had filed other petitions and briefs in reference to taxes for other years, all of which was well known to the plaintiff, its agents and employees.

37

That answering the thirty-seventh paragraph of the petition, reiterating what is said in Paragraph 36 of this answer, the defendant denies that any false representation was made to the plaintiff or any fraud practiced upon it; that the plaintiff had access to counsel learned in the law and had same in its employ; that all of its acts in filing waivers, protests and other papers with the Commissioner of Internal Revenue were done under their professional guidance and advice; and defendant further says that at all times the plaintiff was well informed of its rights and of the legal effect of its conduct, and that in no way was it mislead or deceived by any act or conduct on the part of the Commissioner of Internal Revenue or of his agents and employees.

38

That answering the allegations of the thirty-eighth paragraph of the petition the same are untrue and therefore denied.

39

That answering the thirty-ninth paragraph of the petition it is admitted by the defendant that the waiver was enclosed with a letter sent to the plaintiff, but it is denied that any false or misleading representations were contained in said letter or that the plaintiff acted thereon because of any lack of understanding or knowledge of the full purport

of its act and conduct; that the said J. C. Evins, President and Treasurer of the plaintiff, formally executed the said [fol. 51] waiver and signed the same in the course of his efforts to obtain a reduction in said taxes; that the said J. C. Evins is a business man of ability and fully capable of transacting the business in hand, and it is alleged that he had at his service attorneys and counselors learned in the law and that he acted upon their direction and advice, and was fully informed concerning the nature of the transaction in which he was engaged. It is admitted that Exhibit E is a correct copy of the waiver referred to. All other matters and things contained in said paragraph are untrue and therefore denied.

40

That answering the allegations of the fortieth paragraph of the petition the defendant again denies that any false or fraudulent representations were made to the plaintiff or to its president, J. C. Evins; that said J. C. Evins and other employees of the plaintiff corporation were well informed of the rights of the corporation and had access to the revenue laws and the advice and counsel of attorneys learned in the law; and while they had a right to rely upon the representations of the Commissioner of Internal Revenue and his assistants, it is denied that they can now be heard to say that a solemn act performed in an effort to get a reduction in its taxes not only for the period involved in suit but for other taxable periods was done under a misapprehension of their rights caused by deceit and fraud on the part of the Commissioner of Internal Revenue and his assistants. And in further answer to said paragraph the defendant alleges that on account of the tremendous volume of business and activity involved in the assessment and collection of internal revenues for the Treasury of the United States, there are numerous departments of the Bureau of Internal Revenue and thousands of employees whose services are necessary for the handling of the volume of correspondence and business in connection therewith; that by reason thereof oftentimes letters and correspondence in reference to the tax accounts of a single taxpayer are divided and handled by two or more departments and by dozens of individuals in the Bureau; that oftentimes one phase of the taxpayer's protest or letters

and corespondence in reference thereto are handled by separate divisions or departments, so that at times an act [fol. 52] is done or statement is made not actually known or directed by another department, and in very rare instances do the particular matters in hand reach the personal attention and direction of the Commissioner of Internal Revenue. For these reasons and on account of these conditions the defendant avers and alleges that it was impossible and improbable that a fraud or deceit should have emanated in the mind of any one person or in the minds of any one or two persons connected with the handling of the correspondence in reference to the petitions and briefs of the plaintiff filed in reference to the period 1918; with intent to deceive and mislead the plaintiff or any other person; that these facts are generally known to taxpayers and attorneys who practice before the Department and who handle income tax matters; and for that reason the defendant avers that it is incumbent upon the taxpayer, and was incumbent upon the plaintiff in this case, to have used his own judgment and relied upon the advice and counsel which was given to him by attorneys and auditors in his employ and at his command; and that the effort now to charge deceit and fraud against the Commissioner of Internal Revenue and his assistants is but an effort to escape negligence or carelessness on the part of the plaintiff in the handling of its affairs in connection with the Bureau of Internal Revenue.

41

That answering the allegations of the forty-first paragraph of the petition the defendant again denies any false representations or fraud on the part of the Commissioner of Internal Revenue or his assistants, and in further answer reiterates what has heretofore been said in the fortieth paragraph of this answer.

42

That answering the forty-second paragraph of the petition it is denied that there was any false representation or deceit practiced by the Commissioner of Internal Revenue or his assistants inducing the plaintiff to execute and file the waiver referred to, and it is denied that the same was [fol. 53] induced by a mutual mistake between the parties or on the part of either of the same.

43

That answering the forty-third paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

44

That answering the forty-fourth paragraph of the petition it is denied that the plaintiff received no benefits or advantages in the filing of said waiver as will be more fully set forth and explained in the further answer to the petition.

45

That answering the forty-fifth paragraph of the petition the same is admitted to be true.

46

That answering the forty-sixth paragraph of the petition the same is admitted to be true.

47

That answering the forty-seventh paragraph of the petition it is admitted that the waiver marked Exhibit H was filed with the Commissioner January 19, 1924 and that the copy attached is a true copy thereof. All other matters and things in said paragraph are denied.

48

That answering the forty-eighth paragraph of the petition it is admitted that on December 3, 1924 the Commissioner of Internal Revenue sent with a letter to the plaintiff as alleged a waiver for execution and filing by the plaintiff. It is further admitted that the copy of said letter marked Exhibit I is a correct copy thereof.

[fol. 54] 49

That answering the forty-ninth paragraph of the petition it is admitted that the two waivers described in said paragraph were filed with the Commissioner of Internal Revenue by the plaintiff, and that the exhibits marked Exhibit J and Exhibit K are correct copies thereof.

50

That answering the fiftieth paragraph of the petition it is admitted that the Commissioner of Internal Revenue requested the plaintiff to execute a waiver as set forth in said allegation and that plaintiff signed and filed the same November 18, 1925, and that the exhibit marked Exhibit L referred to is a correct copy thereof.

51

That answering the fifty-first paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

52

That answering the fifty-second paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

53

That answering the fifty-third paragraph of the petition it is denied by the defendant that there was any misrepresentation or mutual mistake in the execution and signing of said waivers, and the defendant alleges that the said J. C. Evins, president of said corporation, signed the same freely and voluntarily without influence of deceit or misstatement, and defendant avers that same are valid and subsisting instruments for the purposes therein expressed.

[fol. 55] 54

That answering the fifty-fourth paragraph of the petition, same is untrue and therefore denied.

55

That answering the fifty-fifth paragraph of the petition, for the reasons hereinbefore set out in previous paragraphs of this answer, the allegations of said Paragraph 55 are denied.

56

That answering the fifty-sixth paragraph of the petition it is admitted that at the time J. C. Evins, President and Treasurer of the plaintiff corporation, signed said waivers

referred to, the same did not contain the signature by or on behalf of the Commissioner of Internal Revenue, but the defendant avers that after the same were forwarded to the Commissioner the same were formally and duly executed by and on behalf of the Commissioner of Internal Revenue and became valid and subsisting instruments for the purposes therein expressed.

57

That answering the fifty-seventh paragraph of the petition the matters and things therein alleged are untrue and therefore denied.

58

That answering the fifty-eighth paragraph of the petition, the same is admitted to be true.

59

That answering the fifty-ninth paragraph of the petition, the matters and things therein alleged are admitted to be true excepting any liability alleged against the defendant.

[fol. 56] 60

That answering the sixtieth paragraph of the petition it is admitted that John F. Jones was not at the time of the bringing of this action and is not now the Collector of Internal Revenue for the District of South Carolina.

By way of further answer and defense the defendant says:

1

That with reference to a large portion of the tax herein set forth, to wit, $102,420.96, which was assessed for the fiscal year ended March 31, 1918 by the Commissioner of Internal Revenue on the May 1921 list, against the plaintiff above named, the plaintiff on July 7, 1921 filed with the Commissioner of Internal Revenue a claim for abatement in language and form as follows:

Claim for Abatement

Taxes Erroneously or Illegally Assessed

STATE OF SOUTH CAROLIA,
County of Spartanburg, ss:

(Important: This claim should be forwarded to the Collector of Internal Revenue from whom notice of assessment was received.)

(Name of Claimant:) Clifton Manufacturing Company.

(Address of claimant; give street and number as well as city or town, and state:) Clifton, S. C.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

[fol. 57] 1. Business engaged in by claimant: Manufacture of cotton goods.

2. Character of assessment or tax: Income and Excess Profits Tax for fiscal year 1918.

3. Amount of assessment: $102,420.26.

4. Amount now asked to be abated: $80,800.12.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

The Agent was in error in his adjustment of depreciation taken for the period from 1904 to 1916, inclusive. In Memorandum 106, issued by the Commissioner of Internal Revenue since the Revenue Agent made his examination—which memorandum was for the guidance of the Income Tax Unit in the adjustment of depreciation for prior years—it is provided that where the assets were reasonably worth at the beginning of the taxable year the amount at which they were carried on the books of the corporation, no further adjustment would be required.

It appears that the Agent was in error in his adjustment of stock in process in taking same on the basis of the cost of cotton plus 80% of the cost of finished goods—the correct basis being the cost of cotton plus 50% of the cost of finished goods, this basis, we understand, having been accepted by the Department as reasonable and fair.

The original returns show stock in process taken at an arbitrary figure. The proper adjustments have been made in the amended returns in the inventory of stock in process, same being taken in accordance with Departmental regulations, at "cost" or "cost or market, whichever is lower."

We respectfully request the abatement of the above assessment, based upon the amended returns hereto attached, and if our Claim for Abatement is not approved, we hereby [fol. 58] request that we be granted a hearing, at which time we may be heard in support of same.

(S.) J. C. Evins.

Sworn to and subscribed before me this 6th day of July 1921. H. K. Osborne, N. P. S. C.

2

That having filed said claim for abatement in reference to said tax and thereby obtained a stay and a delay in the collection of the same, under the provisions of Section 611 of the Revenue Act of 1928, a payment of the same after the expiration of the period of limitations properly applicable thereto is not an overpayment of tax under the provisions of Section 607 of said Act, and defendant avers with reference to said tax the plaintiff cannot maintain this suit for recovery thereof and the same is hereby pleaded in bar.

3

That having executed and filed the several waivers set out and described in the bill of complaint and admitted in the answer referring thereto, the assessment and collection of the entire amount of tax involved in suit was made within the period of limitations properly applicable thereto as extended by said waivers, and the same is hereby pleaded in defense and bar of recovery by this action.

Wherefore the defendant prays judgment that the action be dismissed; that judgment be rendered in favor of the defendant; that the plaintiff recover nothing by this action; that judgment be rendered in favor of the defendant for the recovery of its costs; and for such other and further relief as the defendant may be entitled.

(Sgd.) Joseph A. Tolbert, United States Attorney.

[fol. 59] *Duly sworn to by Joseph A. Tolbert. Jurat omitted in printing.*

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

L-1498

CLIFTON MANUFACTURING COMPANY, a Corporation,
Plaintiff,

vs.

THE UNITED STATES, Defendant

Opinion

Statement of Issues

While the pleadings in this case are voluminous, the real issues may be stated more briefly. The statement of facts hereinafter set out will serve to present the issues in such further detail as may be necessary to their complete understanding.

The complaint was filed on October 13, 1931. It demands judgment against the defendant for the sum of $162,805.61 and interest, as a refund of taxes claimed to have been illegally assessed and collected after such assessment and [fol. 60] collection had been barred by the Statute of Limitations. As to the amount, plaintiff now claims only the sum of $57,265.76, with interest from October 15, 1926, at the legal rate, and there seems to be no dispute that if entitled to recover at all, this is the correct amount. The collection in question involved assessments imposed upon plaintiff for the fiscal year ending March 31, 1918. The first returns were filed on May 28, 1918, and the second return was filed on April 29, 1919, after the passage of the Revenue Act of 1918. Anticipating a defense founded thereon, plaintiff set out in its complaint the filing of certain waivers with the Commissioner of Internal Revenue, the first being under date of June 25, 1923, a number of others being filed from time to time up to and including the date of November 18, 1925. An inspection of these dates shows that the first waiver was signed more than five years after the filing of the original returns, but within less than five years after the filing of the second return. It is the contention of plaintiff that the filing of the first returns began the tolling of the Statute of Limitations, and that the right

of assessment and collection had become barred before the filing of the first waiver. It is further contended that these waivers were obtained from the plaintiff through fraud and misrepresentation upon the part of the Government's agents; that they were obtained and signed under mutual mistake; that the officer of the corporation, who signed as treasurer or as president and treasurer, had no authority in law to execute such waivers; and the Court is asked in its equitable jurisdiction to declare said waivers void and ineffective. It will be observed that plaintiff raises no question as to the correctness of the amount assessed and collected, but only as to the right of the Government, at the time it was done, to assess and collect, the sole issue being (if the waivers were invalid) whether defendant's right to assess and collect had been barred by the Statute of Limitations. Defendant interposes a general denial of liability, and sets up as a bar to recovery the fact that a claim for abatement had been filed with the Commissioner of Internal Revenue by the plaintiff on July 7, 1921, and also alleges validity of the several waivers described in the bill of [fol. 61] complaint, and their sufficiency to avoid the Statute of Limitations. Defendant also maintains that the tolling of the Statute of Limitations did not begin until after the filing of the second return on April 29, 1919. At the hearing, defendant interposed a motion to dismiss, substantially upon the ground that the plaintiff had itself alleged the execution of the waivers above referred to, which, if valid, barred the right of recovery; and that the Court is without jurisdiction in this action to grant the equitable relief requested. The motion was also grounded upon the contention that plaintiff is seeking, through the means of equitable relief, to cancel a written instrument in order to obtain the benefit of the Statute of Limitations, which would be in violation of the maxim that "he who seeks equity must do equity". From the foregoing, it will be seen that the issues thus presented to the Court are, as follows:

I. Upon the motion to dismiss: Does the Court have jurisdiction to determine the validity or cancellation of the waivers?

II. Upon the merits:

(a) Does the Statute of Limitations begin to run from the filing of the first returns on May 28, 1918, or from the filing of the second return on April 29, 1919?

(b) The validity and effect of the waivers.

The action is brought under Section 24(20) of the Judicial Code (28 U. S. C. A. 41(20)), the amount claimed being in excess of Ten Thousand Dollars; and since it is admitted that the Collector of Internal Revenue, who made the collection, is now out of office, there is no question of the Court's jurisdiction under the provisions of the Tucker Act.

Statement of Facts

So far as the testimony goes, there is no substantial, if indeed any, conflict. Both sides have filed requests for findings of fact and of law, but the difference in the requests as to facts relates not so much to a difference of [fol. 62] opinion of what took place, as to the effect of what was done. From the testimony and certain stipulations filed by counsel, I find the facts to be, as follows:

The plaintiff is now and was, at all times hereinafter referred to, a corporation chartered under the laws of the State of South Carolina, with its principal place of business in the Western District of said State, and during all such times J. C. Evins was and is President and Treasurer thereof. As such executive officer, he filed the various returns and waivers herein mentioned, conducted the negotiations and correspondence with the Government, made payments of taxes from time to time, and filed the claims for abatement and refund herein referred to. Plaintiff filed its original returns under the Revenue Act of 1917, for the fiscal period of April 1, 1917 to March 31, 1918, on May 28, 1918, showing a tax due of $171,002.96. This tax was paid on September 11, 1918. After the passage of the Revenue Act of 1918, said corporation filed, on April 29, 1919, an additional return, covering the period ending March 31, 1918, showing an additional tax due of $50,638.75, which was paid $13,690.65 on March 21, 1919, and $36,948.10 on September 15, 1919. In June, 1919, an additional assessment of tax was made for said fiscal period and paid by the corporation on June 16, 1919. An additional deficiency assessment of tax for said fiscal period was made against the corporation in May, 1921, and paid, as follows: $1,124.35, March 15, 1923; $1,665.96, September, 1926; $99,629.95, October 15, 1926, and an interest

charge of $31,147.32. On September 4, 1926, an additional deficiency assessment was made against the corporation in the sum of $37,313.46, and interest to the amount of $1,174.61. In reference to this assessment, a deficiency letter was mailed to taxpayer on May 26, 1926, and no appeal was taken to the Board of Tax Appeals. The tax was paid on October 15, 1926. On July 7, 1921, the corporation filed a claim for abatement for $80,800.12 of the amount of $102,420.26, which was assessed in May, 1921. This claim was not allowed, but the date of disallowance is not disclosed by the evidence. This however, appears to be immaterial, since both sides concede that the portion of the tax covered by the claim for abatement cannot, in [fol. 63] any event, be recovered by plaintiff, because of the provisions of Section 611 of the Revenue Act of 1928, as construed in Graham & Foster v. Goodcell, 282 U. S. 409, and there is, therefore, no dispute as to the amount which plaintiff is entitled to recover, in the event that its claim is allowed by the Court. Claim for refund to the amount of $175,000.00, for the period ended March 31, 1918, was filed by the corporation on September 20, 1928, assigning among other reasons for basis of the claim that the amounts collected in October, 1926, were barred by the Statute of Limitations applicable thereto. The claim was rejected on October 24, 1929. On June 21, 1923, the Acting Deputy Commissioner of Internal Revenue wrote to the plaintiff a letter, of which the following is a copy:

(Letterhead, Treasury Department)

June 21, 1923.

Clifton Manufacturing Company, Clifton, South Carolina.

Sirs: Reference is made to the proposed additional assessment in the amount of $74,876.74, for the year 1918, as outlined in office letter dated March 5, 1923.

You are advised that in order that the interests of the Government may not be jeopardized, pending consideration of your brief dated March 16, 1923, you are hereby requested to fill out and properly execute the enclosed form of waiver and return the same to this office within thirty days from the date of this letter.

In your letter of transmittal, reference should be made to IT:CA:M-2-RJR-2112-11.

Respectfully, J. G. Bright, Acting Deputy Commissioner, by (Sgd.) John G. Remey, Chief of Section.

Enclosure: Form of Waiver.

[fol. 64] In reply thereto, the following letter was sent the Commissioner of Internal Revenue:

(Letterhead, Clifton Manufacturing Company)

June 25, 1923.

Commissioner of Internal Revenue, Washington, D. C.

DEAR SIR: Replying to yours of the 21st inst. IT:CA:M-2-RJR-2112-11, as requested we have signed and herewith return waiver covering the adjustment of additional taxes assessed against Clifton Mfg. Co. for the year 1918.

Very truly yours, (Sgd.) J. C. Evins, Pres.

This letter enclosed waiver, of which the following is a copy:

Income and Profits Tax Waiver

(872M.)
IT:CA:M-2.
2112; RHR 11.

Clifton, S. C.,
June 25, 1923.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Clifton Mfg. Co., of Clifton, S. C., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Clifton Mfg. Co. for the years 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other pur-
[fol. 65] poses", approved August 5, 1909. This waiver is

in effect for one year from the date it is signed by the taxpayer.

Clifton Mfg. Co., Taxpayer (Seal), by (Sgd.) J. C. Evins, Pres. & Treas. (Sgd.) D. H. Blair, Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Subsequent correspondence followed and other waivers were executed by the plaintiff under dates of January 19, 1924, December 4, 1924, and November 18, 1925. On each of these waivers appeared, underneath the signatures of the parties, as in the one hereinabove set out, the following: "If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed". It will be observed that the waivers were signed in each instance in the name of the corporation, by J. C. Evins, as Treasurer or as President and Treasurer, and the seal of the corporation was in each instance affixed.

The Court finds that the Act of 1918 and the departmental regulations required the filing of a new and independent return in the instant case; that material changes in the law were effected by said act, and additional information was required to be furnished, and that the corporation was required by said act to pay additional taxes. We also find that the tolling of the Statute began with the filing of the second return on April 29, 1919, and not [fol. 66] on May 28, 1918, upon the filing of the first returns, as claimed by plaintiff. While this disposes of the ground upon which plaintiff bases its claim of misrepresentation and mutual mistake, and in effect also its claim of lack of authority of its president and treasurer to sign the waivers, the Court finds as a fact that there was no such misrepresentation, mutual mistake or lack of authority as to invalidate the waivers, even if signed after the

expiration of the statutory period. Whether the statutory period had or had not expired when the first waiver was signed was sufficiently uncertain to create a divergence of views. One of the main issues in the instant case is whether, under the law, the Statute began to run from the date of filing of the first returns or from the date of filing of the second return. The issues have been much clarified by later decisions of the Supreme Court, particularly Bowers v. New York & Albany Lighterage Co., 273 U. S. 346; Florsheim Bros. Dry Goods Co. v. United States, 280 U. S. 453; and Stange v. United States, 282 U. S. 270. If a mistake existed, it was a mistake principally as to a question of law, of which both sides are presumed to have had knowledge, and one side was as familiar with the facts as the other. It is evident that both the representatives of the Treasury Department and of the plaintiff corporation affixed their signatures to the waivers under the impression that the statutory period of limitation had not expired. Certain of those representing the Commissioner of Internal Revenue testify that, under the policy of the Government, a waiver would not have been requested if it had been understood that the statutory period of limitation had expired; and Mr. Evins, President and Treasurer of the plaintiff corporation testified that he had no authority to sign and would not have signed if he had understood such fact to exist. Certainly there was no positive misrepresentation of fact on the part of the Government's representatives and it is evident to my mind that, entertaining the view that he did, the Deputy Commissioner would have proceeded immediately with an effort to levy and collect such taxes as his investigation indicated were due, in order to protect the Government's interests, unless the waivers had been filed. The claim for abatement had been filed on July 7, 1921, and whether the claim had then been disallowed or not, [fol. 67] plaintiff evidently regarded it as meritorious and equally, with the Deputy Commissioner, desired the benefit of complete and proper investigation of records, in order to arrive at the amount justly due.

I further find that the waivers signed by its president and treasurer were valid and binding upon the corporation. Such further discussion of the facts and findings thereon, as may be necessary to this opinion, will appear

subsequently herein, in connection with my conclusions upon the law of the case.

Conclusions of Law

1. Motion to Dismiss

As stated above, this action is brought under Section 24(20) of the Judicial Code, (28 U. S. C. A. 41 (20)), which grants jurisdiction to the Courts in the following language:

"Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all setoffs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, [fol. 68] if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury."

Particular attention is directed to the expression, "would be entitled to redress against the United States, either in a court of law, equity, or admiralty", and, "for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of

any penalty claimed to have been collected without authority or any sum alleged to have been excessive *or in any manner wrongfully collected*". (Italics ours.)

The defendant earnestly stresses the contention that the issues of fraudulent misrepresentation and mutual mistake are equitable in their nature, and only cognizable by a court of equity, and that the Court is, therefore, without jurisdiction to consider these issues in the instant action; and that since the waivers, which are those sought to be avoided and cancelled, are set up in the complaint, the action must be dismissed, it being undisputed that the waivers, if valid, would preclude plaintiff's recovery. We think that the language of the statute so plainly confers upon the courts the requisite jurisdiction to determine equitable issues as to leave no room for argument upon that particular point. This, however, does not of itself dispose of the question of the right of the Court in the instant case to determine these equitable issues. Federal courts have, from the beginning of our jurisprudence, been careful to preserve the distinction between actions at law and suits in equity. Formerly, it was an unbending rule in these courts that legal and equitable issues must be tried in separate suits or actions. In South Carolina the rule was early adopted that when, in the course of a proceeding at law, an equitable issue arose necessary to the pre-determination of a legal issue, the action at law would be stopped and a separate issue made up in equity and first tried. Conversely, where, in a suit in equity, a legal right came into controversy, triable as of right by a jury, the suit in equity was suspended and an issue at law made up [fol. 69] for trial by a jury. In each case, upon the determination of the special issue, the case was restored to the proper docket and proceeded to final judgment. The order in which these issues should be tried is to be determined by the judge as a matter of discretion. W. B. Boyle Co. v. Automobile Ins. Co. of Hartford, Conn., (S. C.) 166 S. E. 886. The rule in the United States courts required, in cases where it developed in the course of the proceeding that the case was improperly brought, either at law or in equity, that the whole proceeding be dismissed and a new suit or action filed. In recent years, while still jealously maintaining the distinction between suits in

equity and actions at law, the practice has been much liberalized, particularly under the new rules in equity, promulgated in 1913, Rules 22 and 23 being applicable to the case at bar. The practice has been further liberalized under the Act of March 3, 1915, 38 Stat. 956, Judicial Code Section 274-a. In the case of Twist v. Prairie Oil Co., 274 U. S. 684, the Court discusses the distinction that must be maintained between suits in equity and actions at law. In that case it was held that waiver is permissible because the objection to equity jurisdiction does not go to the power of the federal court but to the merits. Rule 22 makes it plain that it was the purpose of the Supreme Court so to liberalize the practice as to avoid the former drastic rule, which required the dismissal of a cause mistakenly brought in the wrong jurisdiction. When taken in connection with the section of the Judicial Code above referred to, it is evident that it is not now intended to limit transfers under this rule to cases in which the bill itself might fail to contain sufficient allegations to present a case for equitable relief, but also to enable this to be done where issues subsequently raised by the pleadings, or where the admitted or established facts of the case as they might be presented in the case, show the real nature of the case to be one at law. It must be remembered that the remedial provisions of the statute should be liberally construed, both to prevent the unnecessary prolonging of litigation and to prevent the dismissal of causes upon too technical grounds. In the case of Colleton Mercantile & Mfg. Co. v. Savannah River Lumber Co., 280 Fed. 358, (C. C. A.-4), the late Judge Charles A. Woods stated the rule with unusual clearness. That was [fol. 70] a suit in equity to enforce specific performance of a contract. A claim of title to the land had been interposed by one W. B. Cruber, and he was joined as a defendant, in order to remove from the title the cloud cast upon it by his claim. In discussing Equity Rule 23, the Court said that "this rule means that, where in an equity case a matter triable by jury arises, the court shall not refuse to try it, and shall not go through the form of sending it to the law side of the court, but shall determine it according to all the principles applicable—one of which is the right of trial by jury. Under rule 22, if the case is essentially a law case improperly brought in equity, it must be transferred to the law side. Under rule 23, if the case, looked at as a whole, is

an equity case, but a question arises in it triable by jury, a jury trial is held to settle the legal issue without transfer. When the legal issue has been settled by the verdict of the jury, the court adjudicates the equitable issues in the light of the verdict". The foregoing case was quoted with approval in the case of Van Wagenan v. A. L. Reed Co., et al., 287 Fed. 145, at Page 147. In the case of Southern Ry. Co. v. City of Greenwood, et al., 40 F. (2d) 679, this Court had occasion to make an elaborate investigation of the authorities, and the foregoing questions were fully discussed in the opinion. There an action in equity was brought to enjoin trespass upon lands or rights-of-way claimed by the railroad company. The defense raised the question of paramount title and claimed the right of trial of that issue by jury. This right is guaranteed both by the Constitution and statute laws of South Carolina. Since the issue of paramount title was determinative of the right of complainant to recover, we held that the plaintiff's request for a jury trial must be granted, and the case was subsequently determined by a verdict of a jury. A case more nearly similar in its general aspect to the one at bar, is the case of Greenwood Market v. Insurance Co. of North America, 34 F. (2d) 53. In that case suit was brought upon an insurance policy and the defense interposed certain provisions of the policy which were prima facie sufficient to avoid the claim. Plaintiff filed a reply, asking for a reformation of the policy by the attachment of a certain rider showing defendant's consent to the execution of a chattel mortgage by the plaintiff, without which [fol. 71] consent plaintiff could not recover. After the filing of this pleading, plaintiff filed with the Court a motion to have made up an equitable issue, and to have the policy reformed, and asked that the cause be transferred to the equity side of the docket for the hearing of this issue. No amendment of the pleadings was necessary for that purpose, and, after careful consideration, the motion was granted. By consent of counsel, the testimony was taken upon the whole case. The Court decided the equitable issue in favor of plaintiff, and, thereupon, submitted the law issues to the jury. The old practice of having separate judges for the courts of law and chancellors presiding over courts of equity has long since been abandoned in most jurisdictions, and now, particularly in the

district courts, the same judge acts in both capacities. In the instant case, the plaintiff anticipated the defense of and set out the waivers and challenged their validity upon the grounds mentioned. The answer also set up the waivers and relief upon them as barring the right of recovery. Under the statute conferring jurisdiction in such cases as the one at bar, the court has jurisdiction both at law and in equity. The issue presented is one properly cognizable by the court, and we think it is within the power of the court, as also its duty, to determine the issue in the instant case. It might of its own motion, if such course were necessary, transfer the cause to the equity side of the court for the determination of that issue, and since it is a prerequisite to determination of the other issues, we do thus take equitable cognizance and the issues thus raised will be decided upon their merits. While there is some confusion and apparent conflict in the decisions, the weight of authorities is in accord with what we have heretofore said, and particularly as related to the statute under which this action is brought. United States v. Milliken Imprinting Co., 202 U. S. 168; William Cramp, etc. Co. v. United States, 239 U. S. 221; United States Cartridge Co. v. United States, 62 Ct. Cl. 214.

The motion to dismiss is, therefore, overruled.

II. Upon the Merits

(a) Does the Statute of Limitations begin to run from [fol. 72] the filing of the first returns on May 28, 1918, or from the filing of the second return on May 29, 1919?

In the determination of this question, it is necessary to understand the provisions and requirements of the Act of 1918, and, by comparison, to arrive at a proper understanding of the changes and amendments thereby effected in and over former revenue laws. The first returns had reference only to the provisions of the Act of 1917, and were in compliance therewith. The act of 1918 was retroactive in its provisions, and for that reason the return filed in pursuance of that act overlapped a portion of the period covered by the former returns. In view of the language of certain of the decisions cited by plaintiff's counsel, it is important to consider not only what the law required, but what was actually done in compliance therewith. Without attempting to recapitulate in exact words the changes

effected by the latter act, a review of the act will show the following (we quote substantially from defendant's brief): In the Act of 1918, personal service corporations were placed in the same category with partnerships; new excess profits taxes were provided for; a differentiation was made between invested capital and income; a provision was made for taxation of appreciation in property values; in the administration of trusts and estates, distinction was made between income and capital gains; a differentiation was made between earned and unearned income; a change was made in reference to returns and taxes paid based on a fiscal year; consolidated returns were provided for; returns were changed in reference to United States bond and tax-exempt securities required to be listed; a reasonable allowance was made for obsolescence; amortization is provided for; contributions to a special fund for vocational rehabilitation is provided under credits allowed; exemptions in reference to married persons and for dependents are allowed for the first time; and a complete restatement of the terms relating to invested capital is made.

With these changes in view, Section 336 of the Act of 1918, provides, inter alia, as follows: "That every corporation, not exempt under Section 304, shall make a return for the *purposes of this title.*" (Italics ours.) It is true that [fol. 73] Section 205 (a) of the Act makes reference to returns for the fiscal year beginning in 1917 and ending in 1918, and provides for the crediting or refunding of taxes paid thereunder in accordance with another section of the statute. We are of opinion, however, that the purpose of this section was to define rights of the taxpayer and the method of computing the tax, and not intended in any way to abrogate the necessity of making the returns which the act required. The later return filed under the Act of 1918 was required under the law, not only for the purpose of disclosing certain additional information material to the assessment of taxes in accordance with provisions of the act, which involved substantial changes in the law, but also to show, in the event that all requisite information was disclosed under the first returns, that such was a fact. Without such showing, both positive and negative, the Commissioner would not have been in position to make the levy, and it was in compliance with the foregoing requirements that the later return was tendered by the taxpayer and ac-

cepted by the Government. It may be assumed for the purposes of this opinion that the Commissioner was vested with the privilege in certain cases, after an inspection of overlapping returns filed under the Act of 1917, to determine that additional returns were not necessary and to waive the requirement that they should be filed. Evidently such a view was largely determinative of the decisions of the courts, particularly in construing returns filed in pursuance of the Act of 1918, but covering a period retroactively affected by the Act of 1921. In those cases, although filed prior to the passage of the latter act, the Commissioner accepted the returns as sufficient, and made assessments and collected taxes thereon. In the instant case, we think that the facts are sufficient to show that the first returns contained insufficient information for the proper determination of the amounts to be assessed. Certain it is that the new return was required and furnished and formed the basis of the taxes subsequently levied and collected. In this connection, it should be observed that whatever additional taxes were provided by the Act of 1918 for the period beginning January 1 and ending March 31, of that year, were assessed under that act and were not and could not have been assessed or collected until the [fol. 74] passage of the Act in February, 1919. To hold, therefore, that the statute began to run upon the filing of the first returns would result in reducing the period of limitation to considerably less than the five years expressly provided by the statute. We must assume that Congress did not and could not have contemplated or intended such result. While it is true that the returns filed in 1918 were, when filed, complete returns and sufficient in law to fix the period from which the limitation should run, this related of necessity only to such taxes as could be assessed or collected under the Act of 1917. It was not and could not have been contemplated that future retroactive taxes would be levied for the period mentioned, and that a provision of limitation should preclude their collection. The absurdity of such presumption becomes manifest in view of the right of Congress to fix the limitation for any period—four years, one year, or even six months. In such case the assessment and collection might have been barred when the statute was enacted. We cannot conceive such intention on the part of Congress. It is assumed that an

intention of that body to curtail the limitation as affecting a particular case would be expressed in plain and unmistakable language.

Among the cases cited in plaintiff's brief are the following: Myles Salt Co. v. Commissioner, 49 F. (2d) 232, (CCA-5); Isaac Goldman Co. v. Burnet, 51 F. (2d) 427, (D. C. App.); Valentine-Clark Co. v. Commissioner, 52 F. (2d) 346, (CCA-8); Adams, Cushing & Foster, Inc., 19 B. T. A. 89 (dismissed by C. C. A., first Circuit, upon confession of error).

In the first case mentioned, a tax return was filed for the fiscal year ending in 1921, before the enactment of the 1921 Revenue Act. After the passage of the act, no new or amended return was filed or requested. No change was effected by the new act pertaining to the taxpayer's liability, except that by the new act it was deprived of a credit of some two thousand dollars on its net income, thus increasing its tax about $35.00. It was held that the return which would date the beginning of the limitation period and lack of which would prevent limitation, is one made in substantial conformity to the law which required it. The Court held that a return which starts the running of the [fol. 75] statute "must purport to cover the entire period involved, and must show the items of gross income, deductions, and credits of the taxpayer with such definiteness as to permit an assessment of the tax, if accepted as correct". In that case the return was retained by the Commissioner, together with the money paid on it, and later on an audit of it was had, in 1923, without request for any amendment of it. Under the circumstances shown, we have no reason to question the correctness of the Court's decision as limited to the exact point in issue.

Likewise, in the case of Isaac Goldman & Co. v. Burnet, supra, the issues involved an overlapping return for the twelve months' period ending April 30, 1921. In that case the Court held: "We can find no provision in the Revenue Act of 1921 which requires the filing of a new return from taxpayers using the fiscal year basis, in cases where a return had been duly filed under existing law, except, perhaps, *in those cases in which, under the* 1921 *act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved.* (Italics ours). The Court held further: "In this

instance, the taxpayer had filed the return it was required to file under the then prevailing law, and paid the tax. The new law was in all respects the same as the old so far as its tax liability was concerned. The repetition of the figures already filed would have been a wholly vain and useless proceeding''. This case followed the ruling laid down in the case of Myles Salt Co. v. Commissioner, supra. It is evident from the opinion that only one return was filed, and such expressions in the opinion as relate to the running of the statute from the date of the first return, if a second return had been filed, is mere obiter.

The case of Valentine-Clark Co. v. Commissioner, supra, also arose under the provisions of the Act of 1921, and related to an overlapping return for the fiscal year ending January 31, 1921. This case cites as authorities and follows the two cases above discussed. As in the other cases, it is necessary to consider the exact facts surrounding the case, in order to appreciate the distinction between it and the case at bar; and the final decision arrived at, in order [fol. 76] to be properly appreciated, must be considered in connection with the reservations set out in the opinion.

While it is true that the returns filed in 1918 were entitled to be and were accepted as complete returns under the provisions of the law then existing, they did not and could not contemplate subsequent enactments involving all or any portion of the period covered. Upon the passage of the Act of 1918, requiring returns for the purposes of the act, a new situation was created and the returns, so far as that act was concerned, became merely tentative. We think the principles laid down in the case of Florsheim Bros. Dry Goods Co. v. United States, 280 U. S. 453, are applicable here. The Act of 1918 did make certain provisions relating to overlapping returns. It did not declare that such returns should be considered as complete returns for the period embraced in the year 1918 for the purposes of the act, but still required such additional returns for the purposes of the act as might show all requisite information; and it did not provide merely that additional information should be furnished, but required in express language a return for the purposes of the act. Therefore, in whatever sense the returns of 1918 were to be considered in assessing subsequent tax, they must be

regarded as only tentative returns. We deem it unnecessary to review and analyze the cases cited in defendant's brief. The case of United States v. Updike, 32 F. (2d) 1, affirmed 281 U. S. 489, contains certain analogies to the case at bar, and the reasoning supports the views hereinbefore expressed. The case of Davis Feed Co. v. Commissioner, 2 B. T. A. 616, is directly in point, and likewise accords with these views. See also Whitney Bodden Shipping Co. v. United States, 52 F. (2d) 1003; Ralston Purina Co. v. United States, 58 F. (2d) 1065. In the last mentioned case the return was made on November 30, 1918, and after the passage of the Act of 1918, a final return was made on June 16, 1919, and it was held by the Court that the period of limitation began to run upon the filing of the last return. The opinion, however, was devoted mostly to other questions than the one at issue. See also Holmes Federal Taxes, 1922 Ed., p. 829; Prentice Hall Tax Service, Vol. 3, 1932, Par. 19370, subd. (1).

[fol. 77] (b) Validity and effect of the waivers.

Assuming that we are correct in holding that the period of limitation began to run from the date of filing the second return, and that the waivers were, therefore, timely, the questions of fraudulent misrepresentations, mutual mistake and lack of authority of plaintiff's president and treasurer to sign, become entirely moot. The only grounds upon which the validity of the waivers are challenged are based upon the assumption that the limitation provided by statute had expired. The charges of fraudulent misrepresentation, of mutual mistake in executing the waivers, and lack of authority of plaintiff's president and treasurer to execute them, are all predicated upon the claim that the statutory period of limitation had expired. No. claim is, and we assume that none can be seriously, made that the president and treasurer who signed the returns, the claims for abatement and refund, and who made all payments and conducted all correspondence and negotiations with the Government, was without authority in these respects. During all the years since the first returns were filed, he has been in effect the alter ego of his corporation, which has received and accepted the benefit of whatever he did, and which was in position to know, and we must assume did know, acquiesce in and ratify his acts. He was the chief executive officer of the corporation, under whose seal, in

each instance, the waivers were executed, and it was not until in 1928, when the claim for refund was filed, that any question of his authority to sign the waivers was presented to the Government; and even when this was done, it was done by this same officer in the name of the corporation and under its official seal. There is no indication in the evidence that any action by the directors of the corporation authorized the filing of the claim for refund, or any disclaimer by them of the authority of the president and treasurer in signing the waivers. It is evident from the testimony that the whole initiative in this respect was taken by the president and treasurer in the name of the corporation, as in all other transactions and negotiations with the Government. The Court accepts as true the testimony of Mr. Evins that he did not know at the time of signing the waivers that (if such fact could be conceded to be true) [fol. 78] the waivers were filed after the statutory period of limitation had expired, and that he was not vested with authority (an erroneous conclusion of law, however) to execute them under such circumstances. We think it equally true that the representatives of the Government, who negotiated for the waivers, were likewise at the time under the impression that the limitation had not expired. The facts, however, upon which the opinions of representatives of both parties were based, were equally available to both sides. We again call attention to the fact that at the time the first waiver was filed, considerable uncertainty and divergence of opinion existed, both in the minds of the representatives of the Government and of the taxpayer, as to the power to execute and the effect of waivers and as to whether the statutory limitation related merely to the assessment of taxes or to both the assessment and collection. Subsequent statutory provisions operated to clarify these issues, but it was not until years afterwards that the Supreme Court decided in the case of Bowers v. New York & Albany Lighterage Company, supra, that the statutory period of limitation applied both to the assessment and collection, and in the case of Florsheim Bros. Dry Goods Co. v. United States, supra, that where a tentative return was permitted to be filed, the running of the statute did not begin until the filing of the subsequent completed return, and in the case of Stange v. United States, supra, that waivers filed after the expiration of the statutory period of limitation were valid. It must further be remembered

that the Government, in requesting waivers, was particular to enjoin on the taxpayer that they should be executed by the proper official and under proper authority. The Government did rely, and had a right to rely, upon the assumption that these instruments were properly executed under delegated authority. In this view the corporation acquiesced until 1928, a period of approximately five years. Whatever immediate action for levy and collection the Government might otherwise have taken was foregone. The corporation not only ratified the authority of its president and treasurer, through whom it acted exclusively at all times, but also from time to time made the payment of additional assessments without demurrer. Whatever may be the rule in other respects, it has been firmly established [fol. 79] by the Supreme Court that statutes limiting the time for action by the Government in collecting its taxes are to be strictly construed in its favor. DuPont de Nemours Powder Co. v. Davis, 264 U. S. 456, 44 S. Ct. 364; Bowers v. New York & Albany Lighterage Co., supra. "Taxation", as said by Judge Hutcheson, speaking for the Circuit Court of Appeals of the Fifth Circuit, in Independent I. & C. Storage Co. v. Commissioner, 50 F. (2d) 31, "is eminently practical", quoting from Tyler v. United States, 281 U. S. 503, 50 S. Ct. 356, 74 L. ed. 991, 69 A. L. R. 758. "It has to do with matters the great majority of which ought to be, and usually are, disposed of informally, and where rights are substantially preserved, defects in form may not defeat them", and courts will not permit a too technical construction "to defeat a waiver voluntarily executed within the scope of the implied powers of him who executed it, and which was acted upon by the officer of the United States to whom it was addressed". See also Florsheim Bros. Dry Goods Co. v. United States, supra; Aiken v. Burnet, 282 U. S. 277, 51 S. Ct. 148, 75 L. Ed. 338; Brown v. Burnet, 282 U. S. 283, 51 S. Ct. 140, 75 L. Ed. 343; Burnet v. Railway Equipment Co., 282 U. S. 295, 51 S. Ct. 137, 75 L. Ed. 349; Greylock Mills v. Commissioner, 31 F. (2d) 655; Moyer v. East Shore Terminal Co., 41 S. C. 300, 19 S. E. 651, 25 L. R. A. 48; Trustees for Ohio & Big Sandy Coal Co. v. Commissioner, 43 F. (2d) 782; United States v. Southern Lumber Co., 51 F. (2d) 956; J. P. Stevens Engraving Co. v. United States, 53 F. (2d) 1; Concrete Engineering Co. v. Commissioner, 58 F. (2d) 566; Philip Carey Mfg. Co. v. Dean, 58 F. (2d) 737.

Counsel for plaintiff earnestly, and we may add with considerable force of authority, allege that the implied power of an executive officer to execute waivers under the circumstances surrounding the cases above cited, falls short with clothing him with such authority in cases where the right sought to be waived has already been barred by the limitation of the statute. In each case, however, the surrounding circumstances must be taken into consideration in determining that issue. To apply the rule in the instant case would require us to declare invalid a waiver executed in accordance with a request addressed to the [fol. 80] corporation, stating that "it must be signed by such officer or officers as are empowered under the laws of the state in which the corporation is located to sign for the corporation, in addition to which the seal, if any, of the corporation must be affixed". In view of the fact that the receipt of this request carried notice to the corporation; that the officer who signed had custody of and affixed the seal of the corporation; that he was throughout a long period of years the sole representative of the corporation in all its dealings with the Government in making returns, paying taxes, filing claims for abatement and refund; and that the corporation knowing, as it must be presumed to have known, of all these facts and of defendant's reliance upon the waivers, acquiesced in what was done and accepted the benefits that arose or were expected from such reliance thereon; in view of all these facts, the corporation must conclusively be presumed to have ratified what was done by its president and treasurer. The validity of the waivers is, therefore, sustained.

For the reasons hereinbefore set forth, the plaintiff is not entitled to a recovery, and the complaint must be dismissed.

(Sgd.) H. H. Watkins, United States District Judge.

Anderson, S. C., January 31, 1933.

In United States District Court

[Title omitted]

Order for Judgment

This case having come on for trial before me, and having been duly heard upon the testimony and stipulation of

[fol. 81] facts, and having been duly argued by counsel for both parties, and the issues having been determined in accordance with the opinion this day filed. it is, therefore, after due consideration,

Ordered and adjudged, that plaintiff recover nothing upon its complaint herein; that the same be dismissed; and that the defendant have judgment against the plaintiff for the costs of this action.

H. H. Watkins, United States District Judge.

Anderson, S. C., January 31, 1933.

In United States District Court

[Title omitted]

Order Vacating Judgment

Upon motion of Plaintiff's Attorney, consented to by Defendant's Attorney, the Order for Judgment, dated January 31, 1933, is hereby revoked, set aside, vacated and annulled, the same being done at the term of Court at which said Order was signed and entered.

This 2nd day of February, 1933.

H. H. Watkins, United States District Judge. W. A. Sutherland, Attorney for Plaintiff. Joseph A. Tolbert, Attorney for Defendant.

[fol. 82] In United States District Court, Western District of South Carolina

L-1498

Clifton Manufacturing Company, a Corporation, Plaintiff,

vs.

The United States, Defendant

Order for Judgment

This case having come on for trial before me, and having been duly heard upon the testimony and stipulation of

facts, and having been duly argued by counsel for both parties, and the issues having been determined in accordance with the opinion heretofore filed, it is, therefore, after due consideration,

Ordered and adjudged, that Plaintiff recover nothing upon its complaint herein; that the same be dismissed; and that the Defendant have judgment against the Plaintiff for the costs of this action, to each of which rulings, orders and judgment Plaintiff excepts, and the exceptions are allowed.

This 25th day of April, 1933.

(Signed) H. H. Watkins, United States District Judge.

In United States District Court

Bill of Exceptions—Filed April 25, 1933

Be it remembered that the above entitled cause came on for trial on the 30th day of September, 1932, at Anderson, South Carolina, before his Honor, H. H. Watkins, District Judge, sitting as a Judge of said Court, without a jury, [fol. 83] said case being a suit against the United States to recover taxes alleged to have been erroneously and illegally assessed and collected for the fiscal year ended March 31, 1918, which said cause of action is more specifically set forth in Plaintiff's original petition and amendments thereto.

The Plaintiff was represented by Horace L. Bomar, Spartanburg, South Carolina, (on the petition) and W. A. Sutherland, E. Clem Powers and Joseph B. Brennan, all of Atlanta, Georgia.

The Defendant was represented by Joseph A. Tolbert, United States Attorney, Greenville, South Carolina, and W. F. Evans, of the Office of the General Counsel, Bureau of Internal Revenue, Washington, D. C.

At the trial of the case before the Judge without the intervention of a jury as aforesaid, on the 30th day of September, 1932, Plaintiff put in evidence a partial stipulation of facts, with the explanation with reference to Paragraph 8 thereof that it is understood by both parties that Plaintiff makes no admission of the authority of the officer who signed and filed waivers or purported to sign and file waiv-

ers on behalf of the taxpayer corporation. Said partial stipulation of facts is as follows:

"PART STIPULATION OF FACTS

"It is agreed between the parties that the following facts shall be considered as true in the consideration of the issues involved; but any additional testimony concerning the same may be introduced by either party not contradictory thereof, and testimony may be introduced in reference to other facts not agreed upon pertinent to the matters at issue:

"1. The Plaintiff corporation, Clifton Manufacturing Company, filed its original returns under the Revenue Act of 1917, for the fiscal period April 1st, 1917, to March 31, 1918, on May 28, 1918, showing a tax due of $171,002.96. This tax was paid September 11, 1918.

[fol. 84] "2. After the passage of the Revenue Act of 1918, said corporation filed an additional return covering the period ending March 31, 1918, on April 29, 1919, showing additional tax due of $50,638.75. This tax was paid, $13,690.65 March 21, 1919, and $36,948.10 September 15, 1919.

"3. An additional assessment of tax was made for said fiscal period against said corporation June, 1919, and paid June 16, 1919.

"4. An additional deficiency assessment of tax for said fiscal period was made against the said corporation May 1921, and paid as follows: $1,124.35 March 15, 1923; $1,665.96 Sept. 1926; $99,629.95 October 15th, 1926 and interest of $31,147.32.

"5. September 4, 1926, an additional deficiency assessment was made against the said corporation in the amount of $37,313.46, and interest to the amount of $1,174.61. In reference to this assessment, a deficiency letter was mailed to taxpayer May 26, 1926, and no appeal was taken to the Board of Tax Appeals. This tax was paid October 15th, 1926.

"6. July 7, 1921, said taxpayer corporation filed a claim for abatement for $80,800.12 of the amount of $102,420.26 assessed May, 1921. This claim was not allowed.

"7. Claim for refund to the amount of $175,000.00 for the period ended March 31, 1918, was filed September 20, 1928, assigning among other things for basis of claim amounts collected in October, 1926, were barred by statute of limitation applicable thereto. The claim was rejected October 24, 1929.

"8. Waivers were filed by said taxpayer corporation in form and words set forth in Exhibits "E", "H", "J", "K" and "L" of Plaintiff's complaint, on the dates appearing thereon; this statement being made subject to evidence to be introduced by Plaintiff supporting its attack upon said waivers alleged in the complaint."

[fol. 85] The foregoing stipulation was signed by the attorneys for Plaintiff and Defendant and received in evidence as Plaintiff's Exhibit No. 1.

It was further agreed by counsel in open Court that John F. Jones, former Collector of Internal Revenue for the District of South Carolina, was the Collector to whom the taxpayments here involved were made and that at the time of the bringing of this action the said John F. Jones was out of office.

Plaintiff then put in evidence the deposition of James G. Bright, former Deputy Commissioner of Internal Revenue, it appearing that said deposition was taken by consent of the parties, and that all formalities with reference thereto had been waived. The sworn testimony of JAMES G. BRIGHT, as contained in said deposition, reads as follows:

Direct examination.

By Mr. Sutherland:

"My name is James G. Bright. My address is 1514 Barnett Building, Jacksonville, Florida. I was Deputy Commissioner of Internal Revenue from July 1923 until October 1929. In June 1923 I was Assistant Deputy Commissioner. I was Acting Deputy Commissioner from approximately the latter part of May or the first part of June until the first of July. In June as Deputy Commissioner and Acting Deputy Commissioner of Internal Revenue I

had charge of the Washington force and field force of the Income Tax Unit of the Internal Revenue Bureau. I was head of the Income Tax Unit as it was called. I also had charge of excess profits taxes. They were treated the same as income taxes. During my term as Deputy Commissioner and Acting Deputy Commissioner I was the only Deputy Commissioner assigned to the Income Tax Unit. During my term of office as Deputy Commissioner and Acting Deputy Commissioner, it was the policy of the Bureau to request taxpayers to file waivers of the statute of limitations where the Government felt that its interests would be [fol. 86] jeopardized through the running of the statute. It was the policy of the Bureau or Section Chiefs and the Division Chiefs to address letters to taxpayers under my signature, requesting waivers, or other matters pertaining to the audit of income tax return. As I stated before, where the interests of the Government were jeopardized, the Government requested taxpayers to furnish waivers, and by that, I mean where the statute was about to run, and an investigation showed that a taxpayer owed taxes, and it was desirable to give the taxpayers an opportunity of presenting evidence to show that he did not owe the tax claimed by the Government; the Government gave him a right under the law to file a waiver of the statute, with the consent of the Commissioner of Internal Revenue. This was done because the taxpayer, in filing claims for refund against the Government, could not expect the Government to consider such claims where the statute had run, neither would the Government request a taxpayer to file a waiver in those cases where the statute had run. There was no written order to any Section Chiefs covering the condition under which he might or might not request waivers from taxpayers, but in conference with Sections Chiefs, concerning the administration features of the Bureau, it was the well established policy that no Section Chief should request a waiver of the statute of limitations from a taxpayer in cases where the statute had expired. There were cases that came to my attention where the statute had expired, and investigation showed that there was still taxes due, and in such cases, the taxpayer's attention was called to the fact that the statute had expired, and they were then requested to file waivers so as to give both they and the Government an opportunity to go into the merits of the case. It was not

the custom of the Bureau to request waivers of taxpayers, where the statute of limitations had expired."

Q. "State whether or not it was made clear by you to your subordinates that in asking taxpayers for such waivers when they thought the statute of limitations had already run, it was their duty to advise the taxpayer of the expiration of the Statute?"

A. "I answered that in reply to one above, to the effect [fol. 87] that Section Chiefs and Division Heads had been instructed not to request taxpayers to file waivers."

The witness continuing:

"Those instructions were thoroughly understood. The letter, copy of which is attached as Exhibit D to the petition filed in this case and which you now show me, is not the kind of letter that would have been sent out by my subordinates in asking for such waiver, where my subordinates thought that the statute had already expired. It is not the kind of letter that would be sent out to a taxpayer where the statute had expired. I mean where the Unit thought the statute had expired. I know nothing about the facts in this case as to whether the statute had run or not. With reference to the letter, copy of which is attached to the petition in this case as Exhibit G, and which you now show me, this also is not the type of letter that would be forwarded to a taxpayer where the statute had expired, but is a type of letter requesting waivers to be filed where the statute had not expired. The same answer applies to the letter which is attached to the petition as Exhibit I."

Q. "I hand you herewith a letter sent out under your name under date of May 15, 1924, addressed to Mr. Charles A. Holman, which I ask to have marked as Exhibit 1 to these depositions, and ask you whether or not that is the kind of letter which your subordinates were instructed to write in the event that they wished to request a waiver after the statute had already expired, or after they felt the statute had already expired?"

A. "This is the type of letter I have explained heretofore."

The letter dated May 15, 1924, addressed to Mr. Charles A. Holman, which was marked as Exhibit 1 to this deposition of James G. Bright, reads as follows:

EXHIBIT 1

[fol. 88] "Treasury Department, Washington

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue, and refer to IT:PA-5, CTN-505.

May 15, 1924.

Mr. Chas. A. Holman, Savannah, Georgia.

SIR: An examination of your 1918 income tax return discloses an additional tax liability for that year of $2,034.06.

The five-year period provided in Section 250(d) of the Revenue Act of 1921, within which assessment of the additional tax for 1918 may be made on your return, has expired. In order that an assessment of any further tax may be made, it will be necessary for you to sign and return to this office the enclosed form of waiver consenting to the assessment and collection of this tax irrespective of the period of limitations having expired. If you do not care to sign the waiver, but are willing to pay the tax, you may forward a check for the amount to the Collector of Internal Revenue for your district.

If you think that any part of the adjustment of your return is incorrect, the signing of the waiver will not obligate you to pay the tax before opportunity is given you to present your exceptions and to have them considered by this office.

Please advise this office within fifteen days of the action you will take in this matter.

Respectfully, J. G. Bright, Deputy Commissioner,
by A. Lewis, Head of Division."

Enc.: Waiver Form.

[fol. 89] The witness continuing:

"The same rules which I had given my subordinates to govern them in requesting waivers by letter applied to requests for waivers made in conference."

Cross-examination.

By Mr. Evans:

"There were occasions when the Bureau asked for waivers after the period of limitations had expired. In many instances there was considerable question, both of law and fact, at times in reference to a particular case, whether or not the statute had expired, in the early years of investigation of income tax and excess profits tax cases, particularly so up until the passage of the 1924 Act, at which time Congress clarified the position of waivers on both assessment and collection. With reference to tax periods or fiscal periods ending in 1918, subject to the Revenue Act of 1918, there was an excess profits tax return and an income tax return. There was some doubt in the minds of the officials of the Bureau on the expiration of the statute of limitations with reference to the 1918 returns filed as amending their original return filed under the 1917 law. In reference to cases where claims in abatement were pending in reference to a tax, there was a question in the minds of the officials of the Bureau as to whether or not that did not stay the running of the statute, which was clarified by the 1924 Act. I am familiar with the decision in what is known as the New York-Albany Lighterage case. Prior to that decision, it was not wholly the opinion in the Bureau that the statute of limitations did not affect the power of the Collector to distrain, to collect by distraint. The General Counsel's office had advised the Commissioner that there was a possibility that the courts would so hold in the event a case was brought to suit, prior to the rendering of the decision by the Supreme Court. I have no personal recollection or knowledge whatever in reference to this particular taxpayer, the Clifton Manufacturing Company. It was not generally the custom of the Commissioner to [fol. 90] formulate and issue written regulations in reference to matters of this kind, matters of procedure. They were more or less brought out in conference meetings of the Commissioner with the Deputy Commissioner and the Section Chiefs."

Plaintiff then put in evidence the deposition of Leo Speer, of the Office of the General Counsel, Bureau of In-

ternal Revenue, it appearing that said deposition was taken by consent of the parties and that all formalities with reference thereto had been waived. The sworn testimony of LEO SPEER as contained in said deposition reads as follows:

Direct examination.

By Mr. Sutherland:

"My full name is Leo Speer. I am now employed in the office of the General Counsel Bureau of Internal Revenue. I was employed in the same place in November 1925. In November 1925 I was employed in the Review Department, Internal Revenue Bureau. The Review Division was at that time rendering opinions on issues submitted by the Income Tax Unit on questions as to the amount of tax liability due from corporations, individuals, etc., that is, income and excess profits tax liability. I did hold a conference in the case of Clifton Manufacturing Company, Clifton, South Carolina, at or about November 1925. That is the only conference at or about that time that I recall. I don't recall whether or not I requested a waiver of the statute of limitations at that conference. I can't say that I did or did not. As I recall, it was the general practice at that time in cases in which I held conferences to request waiver of the statute of limitations if the statute, or the statute as extended by previous waiver, was about to expire at the time the conference was held, if that matter came to my attention. I have on occasion requested waivers under those circumstances. I don't recall any cases of having requested waivers where I thought the statute of limitations, or the statute as extended by previous waivers, had already expired at the time of the request for the additional waiver. I cannot say that I am really very [fol. 91] familiar with the general practice of the Bureau with reference to the question of waivers in cases where the Government thought the statute of limitations had run at the time the waiver was requested, inasmuch as practically all waivers—or inasmuch as most waivers, were requested by the Income Tax Unit. In other words, that was primarily an administrative policy rather than a question of legal procedure. Frankly, as I previously stated, my experience in requesting waivers was somewhat limited,

due to my position in the office; but to my knowledge it has never been the practice to deceive the taxpayer in any way as to the true situation in the case. Of course I would have followed the procedure of the Bureau in such matters. Under the procedure of the Bureau, as I recall it, such information would have been given. Due to the lapse of some seven years I have no personal recollection whatever with reference to the question of waiver in this particular case of the Clifton Manufacturing Company."

Cross-examination of Mr. Speer was waived by Mr. W. F. Evans, attorney for the Defendant.

The plaintiff then called J. C. Evins, as a witness in its behalf, who testified, under oath, as follows, to-wit:

Direct examination.

By Mr. Sutherland:

"I am J. C. Evins of Spartanburg, South Carolina. I am President and Treasurer of Clifton Manufacturing Company, Clifton, South Carolina, and have been since May, 1916. As Treasurer of the Company I was in charge of tax matters. I received the letter of June 21, 1923 which you show me and a copy of which is attached to the petition as Exhibit B. From a consideration of that letter at that time I understood that the statute of limitations had not run in connection with additional taxes of the Clifton Manufacturing Company for 1918. I so interpreted that letter. I understood from the letter that the statute of limitations had not expired and gave the waiver of June [fol. 92] 25, 1923 under that impression. I certainly did not intend to waive any right that we had as to that. With reference to the effect of the waiver, I thought that I was simply complying with a formality of the Government. If I had known that the statute of limitations had already run in June 1923 I would have felt that I had no right to execute the waiver. I certainly would not have done it.

"The letter dated January 12, 1924 which you show me, and a copy of which is attached to the petition as Exhibit G, was received by me. I interpreted this letter in the same way that I interpreted the last. When I gave the

waiver of January 19, 1924, which is attached to the petition as Exhibit H, I gave it under the same impression under which the waiver of June 1923 was given. That is true as to all of these waivers. And I interpreted the Government's letter of December 3, 1924 in the same way as I interpreted the two preceding letters. And I gave the waiver under the same impression.

"With reference to the last waiver of November 18, 1925, which is attached to the petition, marked Exhibit L, my recollection is that it was in conference in Washington that it first came up, when Mr. Roberts and myself were present, and it was, I think, requested by Mr. Speer, who, I think, was the Government's representative at that time. I presume it was Mr. Leo Speer. At the time Mr. Speer requested that waiver he did not mention anything to us about the statute being open. I have no distinct recollection as to whether he told us the purpose or why he wanted that waiver. Just to sustain the Government's right, I suppose. I thought the Government had a perfect right to ask for these waivers when I gave them. I certainly would not have given the waiver if I had thought that there was any question of the statute having run. With reference to my authority, I previously stated that I would have thought I had no right to give any waiver or any right the Clifton Manufacturing Company had.

"The original income and excess profits tax returns filed in May 1918 were certainly filed in good faith and the honest belief that they represented the true statement of the income and invested capital of the Company.

[fol. 93] "At no time between the receipt of this letter of June 25, 1923, and the filing of the last waiver in November, 1925, did any one call our attention, or did we discover in any way the possibility that there may have been any misrepresentation made to us or that we may have been mistaken of the fact that the statute had run at the time we gave these waivers."

Cross-examination.

By Mr. Evans:

"Prior to the time the first waiver was given the auditing firm of S. H. Boyd in Washington was employed by us to handle our matters. Prior to 1923 we had Cooley &

Marvin also brought into the case. I think Mr. Boyd was our attorney at the time this waiver was given. I cannot say that the waivers in question were sent to Mr. Boyd to send to the Commissioner. I have looked for correspondence and cannot find it. It is not in my file. At that time I consulted Mr. Boyd in reference to our tax matters. I don't think I had previously asked the Department for a special assessment but I could not be clear upon that. At the time the first waiver was given there were negotiations by our Company and the Bureau with reference to our tax matters. I had Mr. Boyd's advice and conferences with him in Washington with reference to these matters. He held our power of attorney. I did not consult with him as to when the periods of limitations would expire. At that particular time I did know something about the period of limitations. I inferred from the letter of the Government that there must be some period of limitation but never looked into the law about it. I don't have any clear cut recollection of the matter but I assume that Mr. Boyd would have advised us. When I received that letter I cannot find that I made any inquiry whether or not that was true. I have looked. Prior to that time Cooley & Marvin had filed a claim for abatement of $80,000.00 of the tax for us. I could not say that I had any clear understanding of the legal effect of that claim for abatement as to the statute of limitations, whether it stayed or stopped it or rested it. I did not inquire as to when the statute began. I presumed from the Government's letter that they had a right [fol. 94] to exact that extension and I therefore acted on that letter under that impression. The letter doesn't seem to refer to the statute of limitations or period within which the Government could act. I don't know anything about whether or not there was a division as to whether or not the Government was controlled by limitations in reference to collecting by distraint. I signed the waiver merely on the Government's letter, which I interpreted to be a right which the Government had to exact. I have no recollection of having made an effort to find out otherwise. I am fortunate in not having had very much litigation, but in matters of taxes I did make it a rule to consult attorneys, as a rule. But this letter was so clear that they had a right, I have nothing in my files to show that I consulted Mr.

Boyd or someone else. Generally I did not sign any other papers without consulting them. Mr. Boyd made up some of the earlier returns of the Company."

Redirect examination.

By Mr. Sutherland:

"I felt that the Government was legally entitled to make a request of that kind. I didn't know anything about the law in the matter. The Government's letter of June 21, 1923, together with the waiver of June 25, 1923, indicated to me that there was a definite time within which the Government must assess income and profits taxes. I don't know whether Mr. Boyd was a lawyer. I understood he was a lawyer and a tax man. I don't know whether he had any legal training or not. If I had known that the statute had expired of course I would not have thought that the Government had a right to exact the waiver."

Recross-examination.

By Mr. Evans:

"The Government letter of June 21, 1923, refers to a Section of the Revenue Act. I did not know what that Section of the Revenue Act referred to. I have no correspondence to show that I referred this to any tax expert. I had no access to the Act. I thought the Government was [fol. 95] within its rights and didn't think it necessary. If the Government asked me to sign a waiver I realized there was some reason they wanted the waiver signed. I read the waiver before signing it. It did not occur to me that possibly I was waiving any of the rights of the Company. It was called a waiver and I knew what a waiver meant. As far as I can find out I signed it without consultation with any one."

The Plaintiff then called DEARING S. ROBERTS as a witness in its behalf, who testified, under oath, as follows, to-wit:

Direct examination.

By Mr. Sutherland:

"My address is Boston, Massachusetts. I am an accounting engineer, auditor, Cooley & Marvin. I have had charge a good many years of the tax department of Cooley & Marvin. I was admitted to practice before the Department, I think possibly in 1919. In 1925 we were handling the tax matters of Clifton Manufacturing Company in connection with Mr. Boyd in Washington. I remember having a conference with Mr. Speer in 1925. Those present were Mr. Speer, representing the Review Division of the Office of the General Counsel, Mr. Evins, Mr. Boyd and myself. I think Mr. Chase of our firm was there also. Toward the latter part of the conference Mr. Speer stated that the waivers on file would expire in the near future, before he would have time to finish the case, and asked us for new waivers to extend the then present waivers so that the statute would not run while he was reviewing the case. I advised Mr. Evins to give the waivers. At the time I gave that advice I thought that the statute was still open on account of the previous waiver. I would certainly not have advised the giving of the additional waivers if I had thought the statute had run. I would have advised not to give the waivers if there had been any question whatever about whether the statute had run.

"I have checked the returns filed in May 1918 under the 1917 Act and the returns filed in April 1919 under [fol. 96] the 1918 Act, and I do not find that there is any information on the second return that was filed that is not contained in the first return of this under the Revenue Act of 1917; that the tax computed under the Revenue Act of 1918 could be computed from the information filed in the first return. I referred to the tax computed by the taxpayer and not the Government, on his first return.

"In the conference with Mr. Speer, Mr. Speer did not state that there was any question about the statute of limitations having already expired. With reference to claims for special assessment on refund claims as compared to protests on special assessment, in my experience I never had any different consideration of a claim for assess-

ment, that is a brief or presentation of facts before assessment, than on a claim for refund."

Cross-examination.

By Mr. Evans:

"I am licensed to practice before the Bureau but not before the Board of Tax Appeals. I am familiar with the New York Lighterage case. I presume that up to the time of that decision the practice in the Department was to contend that while it might not bring a suit at law with reference to taxes it could collect by distraint, regardless of the statute of limitations. I would never advise a client to sign a waiver because of any feeling that while a taxpayer by refusing to sign a waiver might rid himself of a suit in court it might be met eventually by collection by distraint.

"From an examination of the 1917 and 1918 returns, the facts disclosed in one are disclosed in the other. I think the same figures—I think they are identically the same. My recollection is that most of the changes under the 1918 law were to clarify uncertainties in the 1917 law. The 1918 law did make a change on the question of tangible and intangible properties—that's the clarification, but the mistake was made in the 1917 Act. In this particular case from the information on the 1917 return, I would not consider there would be anything to change it under the 1918 Act. In this particular case, there is nothing to indicate that the return under the [fol. 97] 1917 Act did not exclude the proposition that properties under this invested capital might be subject to the regulations of the 1918 Act, particularly in view of the change as to invested capital. It would be highly improbable that such was the case here. I would not hesitate to make up the 1918 return, that is, the return under the Revenue Act of 1918, from the information in the 1917 return, and advise the taxpayer to file it on that basis without even looking at the books. I think that it would be perfectly safe to do that in this case. After the Commissioner had received the 1917 return, and after the 1918 Act had come into effect, he could have computed the tax under the 1918 Act in accepting the Clifton Manufacturing Company's return of 1917. I think he could have safely done so in the absence of a verification as

found in the 1918 return. He held the balance sheet. The Company's schedules had balance sheets. I don't think that it would take the 1918 return to exclude the possibilities which might have arisen, because you have attached to your 1917 return the balance sheet. Here is a balance sheet signed by a certified public accountant, which would indicate that the possibilities you speak of are not there, in the Clifton Manufacturing Company case. There is no such item. I should think that that would be true in reference to all matters or change in the 1918 Act. I know that the rules of the Department required all corporations to file a new return when the 1918 Act was passed."

Redirect examination.

By Mr. Sutherland:

"There was a field examination ordinarily made where the net income was over $50,000.00. I think that was the ordinary practice. Ordinarily these returns would not have been accepted without a field examination."

Thereupon the Plaintiff rested. Defendant then offered in evidence the following documentary evidence:

[fols. 98-104] Defendant's exhibit 1 omitted, see exhibits "A" & "B", printed side pages 19-22, ante.

[fol. 105] DEFENDANT'S EXHIBIT 2

Form 1120—United States Internal Revenue Service

Corporation Income and Profits Tax Return

For Fiscal Period Begun March 31, 1917, and Ended March 31, 1918

Corporation's Name and Principal Place of Business: Clifton Manufacturing Company, Clifton, S. C.

Schedule I—Net Income

Item	1911	1912	1913
1. Net income for each prewar year (as finally determined in income return)	$33,568.30	$215,585.32	$143,737.51
2. Plus amount of corporation excise tax paid in each year	22.73	2,455.12	1,116.80
3. Totals for 1911, 1912, and 1913	33,591.03	218,040.44	144,854.31
4. Less dividends received in 1913	.....	.....	.....
5. Net total for 1913	.....	.....	144,854.31

[fol. 106]

6. Average net income for prewar period (sum of items on line 3 for 1911 and 1912 and item 5 for 1913, divided by number of years	132,161.93
7. Net income for taxable year (Item 25, Schedule A, page 2)	652,402.72

Schedule II—Invested Capital

Item	1911	1912	1913	Taxable Year
1. Capital, surplus, and undivided profits at the close of the preceding year as shown by corporation's books before any adjustments are made therein (from Schedule E)	$1,477,971.76	$1,614,575.31	$1,717,137.14	$1,939,857.07
2. Plus adjustments by way of additions (from Schedule F)	356,590.03	356,590.03	356,590.03	356,590.03
3. Total	$1,834,561.79	$1,971,165.34	$2,073,727.17	$2,296,447.10
9. Invested capital for each year	1,834,561.79	1,971,165.34	2,073,727.17	2,296,447.10
Average invested capital for prewar period (sum of items on line 9 for 1911, 1912 and 1913 divided by number of years				1,993,151.43
Increase of decrease in invested capital for taxable year compared with prewar invested capital				303,295.67

[fol. 107] Schedule III—Excess-Profits and War-Profits Credits

Excess-Profits Credit

1. Eight per cent of invested capital for taxable year (Item 9 last column, Schedule II)	$183,715.77
2. Exemption ($3,000)	3,000.00
3. Excess-profits credit (Item 1 plus Item 2)	186,715.77

War-Profits Credit

4. Average net income for pre-war period (Item 6, Schedule I)	$132,161.93
5. Plus 10% of increase or minus 10% of decrease shown by Item II, Schedule II	30,329.57
6. (a) Total of (or difference between) Items 4 and 5, or (b) 10% of invested capital for taxable year (Item 9, last column, Schedule II), whichever is larger	229,644.71
7. Exemption ($3,000)	3,000.00
8. War-Profits Credit (Item 6 plus Item 7)	232,644.71

Schedule IV—Computation of Taxes

War-Profits and Excess-Profits Tax (Brackets One and Two)

1 Brackets	2 Amount of net income (Item 7, Schedule I) in each bracket	3 Excess-profits credit (Item 3, Schedule III)	4 Balance subject to tax	5 Rate	6 Amount of tax
1. Not over 20% of invested capital.	$459,289.42	$186,715.77	$272,573.65	30%	$81,772.09
2. Over 20% of invested capital	193,113.30	.....	193,113.30	65%	125,523.65
3. Totals	652,402.72	.....	.....	....	207,295.74

[fol. 108] War-Profits and Excess-Profits Tax (Bracket Three)

4. Net income for taxable year (Item 7, Schedule I)	$652,402.72	
5. Less amount of war-profits credit (Item 8, Schedule III)	232,644.71	
6. Balance	419,758.01	
7. Eighty per cent of item 6	$335,806.41	
8. Less Item 3 column 6 (if smaller than item 7)	207,295.74	
9. Tax in Bracket Three (Item 7 minus Item 8—if item 8 is the larger, make no entry)		128,510.67
10. Total war-profits and excess-profits tax as computed under Section 301(a) (Item 3 column 6 plus Item 9)	.....	335,806.41

Income Tax

12. Net income for taxable year (Item 7, Schedule I)		$652,402.72	
13. Less interest on obligations of U. S. not exempt (Item 4, Schedule A, page 2)			
14. War-profits and excess - profits tax (Item 10 or 11)	$335,806.41		
15. Exemption	2,000.00	337,806.41	
16. Balance subject to income tax (Item 12 less Items 13, 14 and 15)		$314,596.31	
17. Tax of 12% on Item 16			$37,751.56
18. Item 10 or Item 11 plus Item 17			373,557.97

[fol. 109] Adjustment of Tax for Fiscal Year Ended in 1918

21. That proportion of Item 20 which the number of months within the calendar year 1918 is of the number of months in the entire period	$93,389.49
22. That proportion of a tax computed under the Revenue Acts of 1916 and 1917 which the number of months within the calendar year 1917 is of the number of months in the entire period	128,252.22
23. Total tax (Item 21 plus Item 22)	221,641.71
24. Less total tax already paid for the fiscal year ended in 1918	171,002.96
25. Balance of Tax	$50,638.75
Paid: On submission of tentative return (1031T), $13,690.65	$13,690.65

We, the undersigned, president and secretary of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is to the best of

his knowledge and belief a true and complete return made in good faith pursuant to the Revenue Act of 1918 and the Regulations issued hereunder.

(Sgd.) J. C. Evins, President. (Sgd.) D. K. Anderson, Secretary.

Sworn to and subscribed before me this 28th day of April, 1919. (Sgd.) John B. Jackson, Notary Public for S. C. (Seal.)

[fol. 110] DEFENDANT'S EXHIBIT 3

Claim for Abatement

Taxes Erroneously or Illegally Assessed

STATE OF SOUTH CAROLINA,
County of Spartanburg, ss:

Clifton Manufacturing Company, Clifton, S. C.

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant—Manufacture of Cotton Goods.
2. Character of assessment or tax—Income and Excess Profits Tax for fiscal year 1918.
3. Amount of assessment—$102,420.26.
4. Amount now asked to be abated—$80,800.12.

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

The Agent was in error in his adjustment of depreciation taken for the period from 1904 to 1916, inclusive. In Memorandum 106, issued by the Commissioner of Internal Revenue since the Revenue Agent made his examination—which memorandum was for the guidance of the Income Tax Unit in the adjustment of depreciation for prior years—it is provided that where the assets were reasonably worth at the beginning of the taxable year the

amount at which they were carried on the books of the corporation, no further adjustment would be required.

It appears that the Agent was in error in his adjustment of stock in process in taking same on the basis of [fol. 111] the cost of cotton plus 80% of the cost of finished goods—the correct basis being the cost of cotton plus 50% of the cost of finished goods, this basis, we understand, having been accepted by the Department as reasonable and fair.

The original returns show stock in process taken at an arbitrary figure. The proper adjustments have been made in the amended returns in the inventory of stock in process, same being taken in accordance with Departmental regulations, at "cost" or "cost or market, whichever is lower".

We respectfully request the abatement of the above assessment, based upon the amended returns hereto attached, and if our Claim for Abatement is not approved, we hereby request that we be granted a hearing, at which time we may be heard in support of same.

(Sgd.) J. C. Evins.

Sworn to and subscribed before me this 6th day of July, 1921.

(Sgd.) H. K. Osborne, N. P. S. C.

The foregoing documentary evidence introduced by Defendant is being sent up to the Circuit Court of Appeals in its original form by special order of the District Court.

After the introduction of said documentary evidence, Defendant rested its case.

The foregoing was all of the evidence heard or admitted by either side in this case.

At the close of the evidence the Court announced that a reasonable time would be allowed to both sides for filing requests for findings of fact and conclusions of law and for making such motions as might be desired, and for noting exceptions and having the same allowed with reference to [fol. 112] the Court's action or failure to act in such matters, and that the trial of the case would continue from term to term for all of said purposes.

Thereafter, within the time allowed by the Court, Plaintiff submitted the following requests for findings of fact and conclusions of law.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT

Plaintiff respectfully requests that the Court make the following Findings of Fact:

1. At all times hereinafter mentioned the Plaintiff was, and still is, a domestic corporation, organized and existing under the laws of the State of South Carolina, with its principal office and place of business at Clifton, Spartanburg County, in the Spartanburg Division of the Western District of South Carolina.

2. On May 28, 1918 Plaintiff filed with the Collector of Internal Revenue for the District of South Carolina its income tax return on Form 1031 and its excess profits tax return on Form 1103, for the fiscal year ended March 31, 1918, both of which were duly executed and verified by Plaintiff in accordance with the law.

3. The principal information which was contained in the income tax return, on Form 1031, referred to in paragraph 2, has been set forth in Exhibit 3, attached to the petition in this case, which Exhibit is incorporated in these Findings of Fact by reference and made a part hereof.

4. The principal information which was contained in the excess profits tax return, on Form 1103, referred to in paragraph 2, has been set forth in Exhibit B, attached to the petition in this case, which Exhibit is incorporated in these Findings of Fact by reference and made a part hereof.

5. The income and excess profits taxes shown by said returns, referred to in paragraph 2, amounting to $171,002.96, were paid by Plaintiff to the Collector of Internal Revenue [fol. 113] for the District of South Carolina on September 11, 1918.

6. Pursuant to the requirement of Treasury Decision No. 2797 (dated March 11, 1919), Plaintiff on April 29, 1919 filed with the Collector of Internal Revenue for the District of South Carolina an amended income and profits tax return, on Form 1120, for the fiscal year ended March 31, 1918.

7. The amended return, referred to in paragraph 6, contained the same information with reference to the amount of net income and invested capital for the pre-war years

(1911, 1912 and 1913), and the same information with reference to the amount of invested capital for the fiscal year ended March 31, 1918, as was contained in the original income and profits tax returns referred to in paragraph 2. The amount of net income for the taxable year, the fiscal year ended March 31, 1918, was shown in the amended return, referred to in paragraph 6, to be the sum of $652,402.72, which sum was also shown to be the amount of net income subject to excess profits tax in the excess profits tax return referred to in paragraph 2. The total net income shown to be subject to income tax on the income tax return, referred to in paragraph 2, was $652,525.30, which amount exceeded the amount shown as taxable net income in the amended return, referred to in paragraph 6, by the sum of $122.58.

8. The said sum of $122.58, referred to in paragraph 7, as the amount by which the item of taxable net income shown in the original income tax return, referred to in paragraph 2, exceeds the item of taxable net income shown in the amended return, referred to in paragraph 6, represented the amount paid by the taxpayer during the taxable year as interest on money borrowed for the purchase of liberty bonds. This sum, with the explanation thereof, is shown in "Schedule 6" on the "Supplementary Statement" attached to the income tax return, referred to in paragraph 2. It also appears in Schedule I of the original excess profits tax return, referred to in paragraph 2, that this amount of $122.58, representing interest paid on indebtedness incurred for the purchase of obligations of the [fol. 114] United States issued since September 24, 1917, and held by the corporation in excess of $5,000.00 par value, was deducted from net income for the taxable year as shown in the original income tax return, referred to in paragraph 2, in order to arrive at the amount of net income subject to excess profits tax.

9. The amended return, referred to in paragraph 6, showed an additional tax of $50,638.75 over and above the taxes shown on the original returns, referred to in paragraph 2, which additional tax resulted solely from the application of the revised rates provided by the Revenue Act of 1918, which was enacted after the original returns, referred to in paragraph 2, were filed.

10. The additional tax in the sum of $50,638.75, referred to in paragraph 9, was paid by Plaintiff to the Collector of Internal Revenue for the District of South Carolina, $13,690.65 on March 21, 1919 and $36,948.10 on September 15, 1919.

11. Original income and excess profits tax returns, referred to in paragraph 2, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912, and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918 and the Revenue Act of 1917, and the Revenue Act of 1916 as amended, provided that the items referred to had been accepted by the Commissioner as correct.

12. The amended income and excess profits tax returns referred to in paragraph 6 did not contain any further information, in addition to the information disclosed in the returns referred to in paragraph 2, which would enable the Commissioner of Internal Revenue to make a more accurate determination or computation of Plaintiff's income and excess profits taxes under the Revenue Act of 1918. [fol. 115] All of the information disclosed in the amended returns, referred to in paragraph 6, which could be used for the computation of income and excess profits taxes under the Revenue Act of 1918 had already been disclosed in the returns, referred to in paragraph 2.

13. The original income and excess profits tax returns referred to in paragraph 2 were prepared and filed by Plaintiff in good faith and in the honest belief that all of the information therein contained was correct, and was intended as a complete and final return.

14. An additional assessment of $3,762.86 against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 was made by the Commissioner of Internal Revenue in June 1919, and was paid by Plaintiff on June 16, 1919.

15. In May 1921 the Commissioner of Internal Revenue assessed against Plaintiff on account of income and excess profits taxes for the fiscal year ended March 31, 1918 an additional amount of $102,420.26, which was paid in the following amounts and on the following dates respectively: $1124.35 on March 15, 1923, $1665.96 on September 15, 1926 and $99,629.95 on October 15, 1926, with interest on this last amount in the sum of $31,147.32.

16. On September 4, 1926 an additional assessment was made against Plaintiff for the fiscal year ended March 31, 1918 in the sum of $37,313.46 principal, and interest in the sum of $1174.61. This tax and interest in the total amount of $38,488.07 was paid on October 15, 1926.

17. On July 7, 1921 Plaintiff filed a claim in abatement for $80,800.12 of the amount of $102,420.26 which had been assessed in May 1921. This claim was not allowed.

18. On or about October 24, 1929 the Commissioner of Internal Revenue issued a certificate of overassessment, for the fiscal year ended March 31, 1918, in the sum of [fol. 116] $7,877.78 principal, and $247.91 interest, or a total of $8,125.69, which sum, together with interest thereon, was refunded to Plaintiff.

19. A claim for refund in proper form, setting forth the ground of the present suit, was filed with the Collector of Internal Revenue on September 20, 1928 and was rejected on October 24, 1929. This suit was commenced on October 13, 1931.

20. On June 21, 1923 the Commissioner of Internal Revenue addressed and sent to Plaintiff a letter requesting Plaintiff to execute a form of waiver which had been prepared by the Commissioner, and which had been enclosed with said letter. This so-called form of waiver was signed under date of June 25, 1923 by J. C. Evins, President and Treasurer of Plaintiff, and was filed with the Commissioner under the circumstances described below.

21. On January 12, 1924 the Commissioner of Internal Revenue addressed and sent to Plaintiff another letter requesting Plaintiff to execute a second form of waiver which had been prepared by the Commissioner, and which had been enclosed with said letter. This so-called form of waiver was signed under date of January 19, 1924 by J. C.

Evins, President and Treasurer of Plaintiff, and was filed with the Commissioner under the circumstances described below.

22. On December 3, 1924 the Commissioner of Internal Revenue addressed and sent to Plaintiff a letter requesting Plaintiff to execute a third so-called form of waiver, which had been prepared by the Commissioner, and which had been enclosed with said letter. Two copies of this so-called form of waiver were signed under date of December 4, 1924 by the said J. C. Evins, and were filed with the Commissioner under the circumstances described below.

23. In November 1925 the Commissioner requested Plaintiff to execute a fourth so-called form of waiver which had been prepared by the Commissioner. Said so-called [fol. 117] form of waiver was signed under date of November 18, 1925 by J. C. Evins, President and Treasurer of Plaintiff, and was filed with the Commissioner under the circumstances described below.

24. In the letters from the Commissioner to Plaintiff dated June 21, 1923 and January 12, 1924, just described, the Commissioner represented to Plaintiff that the statute of limitations for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired. In the letter from the Commissioner to Plaintiff, dated December 3, 1924, just described, the Commissioner represented to Plaintiff that the statute of limitations (as extended by prior waivers) for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired. The Commissioner's agent who requested the so-called waiver of November 18, 1925 also represented to Plaintiff that the statute of limitations (as extended by prior waivers) for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired. All of said representations were false and misleading in that at the time they were made said statute of limitations had already expired and the preceding waivers were invalid because executed under mutual mistake and misrepresentation.

25. Said representations were made with the intention and purpose of causing Plaintiff to execute the waivers requested at the time said representations were made.

26. At the time of the execution of the purported waivers of June 25, 1923, January 19, 1924, December 4, 1924 and November 18, 1925, Plaintiff did not know that the statute of limitations had already expired and that any preceding waivers were invalid.

27. Neither the Government nor its officers nor agents knew of the falsity of said representations and all of the purported waivers, described above were executed under a mutual mistake as to the expiration of the statute of limitations (or the statute as extended by prior waivers).

[fol. 118] 28. But for the mutual mistakes and misrepresentations described above, the said J. C. Evins would not have undertaken to execute the so-called waivers described above, and the execution of said purported waivers resulted solely and proximately from said mutual mistakes and misrepresentations.

29. As a result of the purported execution of said instruments, Plaintiff received no consideration, benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistakes.

30. Plaintiff did not discover the falsity of any of the representations under which any of the above described forms of waiver were procured, nor did Plaintiff become aware of the mutual mistakes under which the Government and Plaintiff labored with reference to the expiration of the statute of limitations, and the invalidity of prior waivers, as described above, until after the signing and filing by J. C. Evins, President and Treasurer of Plaintiff, of the last of the so-called forms of waiver described above.

31. The said J. C. Evins, President and Treasurer of Plaintiff, had no authority to execute, on behalf of Plaintiff, a waiver of the statute of limitations on assessment and collection of income and profits taxes after the expiration of the period of limitation provided in the statute.

32. The Collector of Internal Revenue by whom the taxes described above, and interest thereon, were collected, and to whom said taxes and interest were paid, had ceased to hold said office of Collector of Internal Revenue at the time this suit was commenced.

PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW

Plaintiff respectfully requests that the Court make the following special rulings of law.

1. The period of limitation on the assessment and collection of additional income and excess profits taxes, pro- [fol. 119] vided in Section 250(d) of the Revenue Act of 1921, Section 277(a) (2) of the Revenue Act of 1924, and Section 277 (a) (3) of the Revenue Act of 1926, begins to run, with respect to a fiscal year ended March 31, 1918, upon the filing of the original income and excess profits tax returns for that year, where such returns are made in good faith and without fraud or intent to evade the tax, and where such returns cover the entire period involved and show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax if accepted as correct, even though such returns were filed prior to the passage of the Revenue Act of 1918 on February 24, 1919 and amended returns were filed, under Treasury Decision 2797, showing additional taxes due for the fiscal year ended March 31, 1918 under the Revenue Act of 1918, and even though further additional taxes are found by the Commissioner to be due for said year on account of the correction of some items appearing on both the original and amended returns.

2. A purported waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes, executed by a taxpayer at a time when, unknown to him, the statutory period has expired and the taxpayer has thereby acquired a complete defense and immunity from such an assessment and collection, is invalid and affords no legal defense to the taxpayer's action to recover taxes assessed or collected after the statutory period.

3. A taxpayer, who executes such a waiver in favor of the Government after the statute of limitations had expired, at the request of a Government officer or agent, and upon the false representation by such officer or agent that the statute of limitations has not yet expired, is entitled in equity to relief against the use of such a waiver as a

defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

4. Where a taxpayer executes and files such a waiver with the Government as a consequence of a mutual mistake as to the expiration of the statute of limitations, [fol. 120] both the taxpayer and the officers or agents of the Government with whom he deals mistakenly believing that the statute has not yet expired, the taxpayer is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

5. The president of a taxpayer corporation has no implied or apparent authority to execute, on behalf of his corporation, a waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes after the statutory period has already expired; and, where such officer undertakes to execute such a waiver under such circumstances, in ignorance of the expiration of the statutory period, the purported waiver is invalid and affords no legal defense to the corporation's action to recover taxes assessed or collected after the statutory period.

Thereafter, within the time allowed by the Court at the trial of the case, to-wit, on November 28, 1932, Plaintiff filed its motion for judgment, in the following form:

PLAINTIFF'S MOTION FOR JUDGMENT

"Now comes the Plaintiff and makes this its motion, based upon the pleadings and evidence introduced herein,

"(1) That the Court adjudge and decree that the purported waivers relied upon by the Defendant are void and may not be used as a defense in this action, and

"(2) That the Court order and adjudge that Plaintiff have and recover judgment against the Defendant in the principal sum of $57,265.76, with interest from October 15, 1926, as provided by law.

"Dated November 26, 1932.

Respectfully submitted, Horace L. Bomar, W. A. Sutherland, Attorneys for Plaintiff."

[fol. 121] And thereupon the Court took the case under advisement.

At the time of handing down its opinion, findings of fact and conclusions of law, the Court ordered and directed that both sides be allowed a reasonable time for noting exceptions and having the same allowed with reference to the Court's findings of fact and conclusions of law and the parties' requests for findings of fact and conclusions of law.

Thereafter, to-wit, on April 24, 1933, within the time allowed by the Court, and as agreed to by counsel for both sides, Plaintiff noted and took its exceptions to certain of the Court's findings of fact and conclusions of law and to the failure of the Court to make certain findings of fact and conclusions of law requested by Plaintiff, and said exceptions were allowed, in the following form, to-wit:

PLAINTIFF'S EXCEPTIONS TO CONCLUSIONS OF LAW AND FACTS

1. Plaintiff excepts to the failure of the Court to find specially that the returns filed on May 28, 1918, for the fiscal year ended March 31, 1918, consisted of an income tax return on Form 1031 and an excess profits tax return on Form 1103, both of which were duly executed and verified by Plaintiff, said exception being taken upon the ground that such a finding is required by the undisputed evidence and admissions made in the pleadings.

2. Plaintiff excepts to the failure of the Court to find specially that the principal information which was contained in the income tax return, on Form 1031, referred to in Paragraph 1 above, is the same information which was set forth in Exhibit A attached to the petition in this case, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

3. Plaintiff excepts to the failure of the Court to find specially that the principal information which was con-
[fol. 122] tained in the excess profits tax return, on Form

1103, referred to in Paragraph 1 above, was the same information which was set forth in Exhibit B attached to the petition in this case, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

4. Plaintiff excepts to the failure of the Court to find specially that the return filed by Plaintiff on April 29, 1919, for the fiscal year ended March 31, 1918, was on Form 1120, and was filed with the Collector of Internal Revenue for the District of South Carolina, and that this return was an income and excess profits tax return for said period, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

5. Plaintiff excepts to the failure of the Court to find specially that the return on Form 1120, filed on April 29, 1919, referred to above, contained the same information with reference to the amount of net income and invested capital for the pre-war years (1911, 1912 and 1913), and the same information with reference to the amount of invested capital for the fiscal year ended March 31, 1918, as was contained in the original income and excess profits tax return on Form 1031 and Form 1103, referred to above, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

6. Plaintiff excepts to the failure of the Court to find specially that the amount of net income for the taxable year, the fiscal year ended March 31, 1918, was shown in the return on Form 1120 to be the sum of $652,402.72, which sum was also shown to be the amount of net income subject to excess profits tax in the excess profits tax return on Form 1103, referred to above, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

7. Plaintiff excepts to the failure of the Court to find specially that the total net income shown to be subject to income tax on the income tax return on Form 1031, referred to above, was $652,525.30, which amount ex- [fol. 123] ceeded the amount shown as taxable net income

in the additional or amended return on Form 1120, referred to above, by the sum of $122.58, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

8. Plaintiff excepts to the failure of the Court to find specially that both the original income tax return on Form 1031 and the original excess profits tax return on Form 1103 disclosed that the sum of $122.58 had been paid by Plaintiff during the fiscal year ended March 31, 1918, as interest on an indebtedness incurred for the purchase of obligations of the United States, and that this amount was deducted from net income for the taxable year as shown in the original income tax return on Form 1031 in order to arrive at the amount of net income subject to excess profits tax, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

9. Plaintiff excepts to the failure of the Court to find specially that the additional or amended return on Form 1120 showed an additional tax of $50,638.75 over and above the taxes shown on the original income and excess profits tax returns, which additional tax resulted solely from the application of the revised rates provided by the Revenue Act of 1918, which was enacted after the original returns were filed, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

10. Plaintiff excepts to the failure of the Court to find specially that the original income and excess profits tax returns on Forms 1031 and 1103 respectively, referred to above, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912 and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918 and the Revenue Act of 1917, and the [fol. 124] Revenue Act of 1916 as amended, provided that the items referred to had been accepted by the Commis-

sioner as correct, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

11. Plaintiff excepts to the failure of the Court to find specially that the additional or amended income and excess profits tax return on Form 1120, referred to above, did not contain any further information, in addition to the information disclosed in the original returns on Forms 1031 and 1103 respectively, which would enable the Commissioner of Internal Revenue to make a more accurate determination of computation of Plaintiff's income and excess profits taxes under the Revenue Act of 1918, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

12. Plaintiff excepts to the failure of the Court to find specially that all of the information disclosed in the additional or amended return on Form 1120, which could be used for the computation of income and excess profits taxes under the Revenue Act of 1918 had already been disclosed in the original income and excess profits tax returns on Forms 1031 and 1103 respectively, said exception being taken on the ground that said finding is required by the undisputed evidence and admissions made in the pleadings.

13. Plaintiff excepts to the failure of the Court to find specially that the original income and excess profits tax returns on Forms 1031 and 1103 respectively, were prepared and filed by Plaintiff in good faith and in the honest belief that all of the information therein contained was correct, said exception being taken on the ground that said finding is required by the undisputed evidence.

14. Plaintiff excepts to the failure of the Court to find specially that the additional income and excess profits taxes paid by Plaintiff on June 16, 1919, were in the sum of $3,762.86, said exception being taken on the ground that such finding is required by the admission made in paragraph 19 of Defendant's answer.

[fol. 125] 15. Plaintiff excepts to the failure of the Court to find specially that each of the waivers referred to in the findings of fact were requested of Plaintiff by the Commissioner of Internal Revenue or his Agent upon the repre-

sentation that at the time of the request the statute of limitations (or the statute as extended by prior waivers) for the assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired, and that said representations were false and misleading, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

16. Plaintiff excepts to the failure of the Court to find specially that the representations referred to in the preceding paragraph were made with the intention and purpose of causing Plaintiff to execute the waivers requested at the time said representations were made, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

17. Plaintiff excepts to the failure of the Court to find specially that at the time of the execution of each of the purported waivers referred to in the findings of fact, Plaintiff did not know that the statute of limitations had already expired and that any preceding waivers were invalid, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

18. Plaintiff excepts to the failure of the Court to find specially that each of the purported waivers referred to in the findings of fact was executed under a mutual mistake as to the expiration of the statute of limitations, or the statute as extended by prior waivers, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

19. Plaintiff excepts to the failure of the Court to find specially that Plaintiff's President and Treasurer, J. C. Evins, would not have undertaken to execute any of the so-called waivers referred to in the findings of fact, but for the representation of the Commissioner or his Agents to the effect that the statute of limitations (or the statute as extended by prior waivers) had not yet expired, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

[fol. 126] 20. Plaintiff excepts to the failure of the Court to find specially that Plaintiff's President and Treasurer, J. C. Evins, would not have undertaken to execute any of the so-called waivers referred to in the findings of fact,

but for a mutual mistake, under which the representatives of the Government and the Plaintiff labored, to the effect that the statute of limitations had not yet expired at the time each of said purported waivers was executed, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

21. Plaintiff excepts to the failure of the Court to find specially that the execution of each of the purported waivers referred to in the findings of fact resulted solely and proximately from misrepresentations made by the Government Agents, and mutual mistake, under which the representatives of the Government and the Plaintiff labored, to the effect that the statute of limitations had not yet expired when each of said waivers was executed, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

22. Plaintiff excepts to the failure of the Court to find specially that as a result of the purported execution of each of the waivers referred to in the findings of fact, Plaintiff received no consideration, benefits, advantages or things of value which Plaintiff could tender back upon discovery of said mistake, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

23. Plaintiff excepts to the failure of the Court to find specially that Plaintiff did not discover the falsity of any of the representations under which any of the purported waivers referred to in the findings of fact were procured, and that Plaintiff did not become aware of the mutual mistakes under which the Government and Plaintiff labored with reference to the expiration of the statute of limitations, and the invalidity of prior waivers, until after the signing and filing by Plaintiff's President and Treasurer, J. C. Evins, of the last of the purported waivers referred to in the findings of fact, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

[fol. 127] 24. Plaintiff excepts to the failure of the Court to find specially that Plaintiff's President and Treasurer, J. C. Evins, had no authority to execute, on behalf of Plaintiff, a waiver of the statute of limitations on assessment

and collection of income and profits taxes after the expiration of the period of limitation provided in the statute, said exception being taken on the ground that said finding is required by the uncontradicted evidence.

25. Plaintiff excepts to the Court's finding as a fact that there was no such misrepresentation, mutual mistake or lack of authority as to invalidate the waivers, even if signed after the expiration of the statutory period, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

26. Plaintiff excepts to the Court's finding that "If a mistake existed, it was a mistake principally as to a question of law, of which both sides are presumed to have had knowledge, and one side was as familiar with the facts as the other", said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

27. Plaintiff excepts to the Court's finding that the waivers signed by Plaintiff's President and Treasurer were valid and binding upon the corporation, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

28. Plaintiff excepts to the Court's finding that the original income and excess profits tax returns on Forms 1031 and 1103, respectively, contained insufficient information for the proper determination of the amount of taxes to be assessed under the Revenue Act of 1918, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

29. Plaintiff excepts to the Court's finding that the [fol. 128] original income and excess profits tax returns on Forms 1031 and 1103, respectively, were merely tentative returns, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

30. Plaintiff excepts to the Court's finding that plaintiff ratified the authority of its President and Treasurer

in executing the purported waivers referred to in the findings of fact, said exception being taken on the ground that such finding is contrary to the uncontradicted evidence and the law, and there is no evidence to support said finding.

31. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that the period of limitation on the assessment and collection of additional income and excess profits taxes, provided in Section 250 (d) of the Revenue Act of 1921, Section 277 (a) (2) of the Revenue Act of 1924, and Section 277 (a) (3) of the Revenue Act of 1926 begins to run, with respect to a fiscal year ended March 31, 1918, upon the filing of the original income and profits tax returns for that year, where such returns are made in good faith and without fraud or intent to evade the tax, and where such returns cover the entire period involved and show the items of gross income, deductions and credits of the taxpayer with such definiteness as to permit an assessment of the tax if accepted as correct, even though such returns were filed prior to the passage of the Revenue Act of 1918 on February 14, 1919, and amended returns were filed, under Treasury Decision 2797, showing additional taxes due for the fiscal year ended March 31, 1918, under the Revenue Act of 1918, and even though further additional taxes are found by the Commissioner to be due for said year on account of the correction of some items appearing on both the original and amended returns, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

32. Plaintiff excepts to the Court's ruling as a conclusion of law, that where income and profits tax returns for a fiscal year ending in 1918 were filed prior to the passage of the [fol. 129] Revenue Act of 1918, and where such returns were in complance with the provisions of the Revenue Act of 1917 which was in force at the time the returns were filed, and where additional returns were filed for the same period after the passage of the Revenue Act of 1918, the statute of limitations on the assessment and collection of income and excess profits taxes for said period began to run upon the filing of the additional returns after the passage of the Revenue Act of 1918, and not upon the original income and excess tax returns filed prior thereto, said conclusion being contrary to law.

33. Plaintiff excepts to the Court's ruling, as a conclusion of law, that the Revenue Act of 1918 requires the filing of additional income and excess profits tax returns for a fiscal year ending in 1918 as to which complete income and excess profits tax returns had already been filed in compliance with the provisions of the Revenue Act of 1917, said conclusion being contrary to law.

34. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that a purported waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes executed by a taxpayer at a time when, unknown to him, the statutory period has expired, is invalid and affords no legal defense to the taxpayer's action to recover taxes assessed or collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

35. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that a taxpayer, who executes such a waiver in favor of the Government after the statute of limitations has expired, at the request of a Government officer or agent, and upon the false representation by such officer or agent, that the statute of limitations has not yet expired, is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

[fol. 130] 36. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that where a taxpayer executes and files such a waiver with the Government as a consequence of a mutual mistake as to the expiration of the statute of limitations, both the taxpayer and the officers or agents of the Government with whom he deals mistakenly believing that the statute has not yet expired, the taxpayer is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recivery of taxes collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

37. Plaintiff excepts to the failure of the Court to rule, as a conclusion of law, that the president of a taxpayer

corporation has no implied or apparent authority to execute, on behalf of his corporation, a waiver of the statute of limitations, on the assessment and collection of additional income and excess profits taxes after the statutory period has already expired, and that where such officer undertakes to execute such a waiver under such circumstances in ignorance of the expiration of the statutory period, the purported waiver is invalid and affords no legal defense to the corporation's action to recover taxes assessed or collected after the statutory period, said ruling having been specifically requested by Plaintiff, and correctly stating the law.

38. Plaintiff excepts to the failure of the Court to make specific findings of fact and conclusions of law upon all questions and issues involved in this case, as required by Section 764 of Title 28 of the United States Code.

39. Plaintiff excepts to the failure of the Court to pass individually upon each of Plaintiff's requests for findings of fact and conclusions of law.

This 24th day of April, 1933.

Horace L. Bomar, W. A. Sutherland, Joseph B. Brennan, Attorneys and Solicitors for Plaintiff.

[fol. 131] ALLOWANCE OF EXCEPTIONS

The foregoing exceptions having been taken and noted within the time allowed by the Court and agreed to by both sides, said exceptions are hereby allowed.

This 24th day of April, 1933.

H. H. Watkins, United States Judge.

Thereafter, on April 24, 1933, the Court denied Plaintiff's motion for judgment heretofore filed, to which action of the Court Plaintiff objected and was then and there allowed an exception.

Thereafter, to-wit, on April 25, 1933, the Court entered judgment dismissing the complaint.

For as much as the matters above set forth do not fully appear of record, the Plaintiff tenders this its bill of exceptions and prays that the same may be signed and ap-

proved by the Judge of this Court, and Plaintiff prays further that in view of the equitable, as well as the legal, issue involved in this case this bill of exceptions be treated also as a statement of evidence under Equity Rule 75(b), and that it be approved and certified as such.

Dated April 25, 1933.

Horace L. Bomar, W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION AS TO BILL OF EXCEPTIONS

[fol. 132] It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing bill of exceptions contains all the evidence given and proceedings had on the trial of this case, and that it is correct in all respects, and that the same may be approved, allowed, settled and ordered filed, and made a part of the record herein by the Judge before whom this case was tried, upon the filing of this stipulation, without further or other notice to Defendant or its counsel.

And it is further stipulated and agreed that the foregoing bill of exceptions may be treated as a statement of evidence, and that as such said statement is a correct statement under paragraph B of Equity Rule 75, and the lodgment thereof in the Clerk's office for the examination of the Defendant, and notice of such lodgment and of the time when same will be presented to the Judge for approval, are hereby waived, and the same may be approved by the Judge at once.

This 25th day of April, 1932.

W. A. Sutherland, Joseph B. Brennan, Attorneys and Solicitors for Plaintiff. Joseph A. Tolbert, Attorneys and Solicitors for Defendant.

IN UNITED STATES DISTRICT COURT

ORDER AND CERTIFICATE SETTING BILL OF EXCEPTIONS

The foregoing bill of exceptions was tendered this 25th day of April, 1933, within the time allowed by the rules of

this Court and at the term of this Court at which the judgment of April 25, 1933, was rendered. Said bill contains all the evidence given and proceedings had upon the trial of this action, said evidence being set forth in condensed and narrative form except where the form of question and answer is required for a proper understanding of the questions presented, and in such cases the form of question and answer has been directed by the Court, and said bill is in [fol. 133] all respects correct and is hereby approved, allowed and settled and made a part of the record herein. In view of the equitable issue involved in this case, the foregoing bill of exceptions is also approved as a sufficient statement of evidence under Equity Rule 75(b), it being certified hereby that said statement is true, complete and properly prepared and complies with said Rule.

This 25th day of April, 1933.

(Signed) H. H. Watkins, United States Judge.

In United States District Court

[Title omitted]

Order to Transmit Original Exhibits—Filed April 25, 1933

Upon motion of Plaintiff, with the consent of the Defendent, it appearing to be necessary and proper that the original papers introduced in evidence in this case as Defendant's Exhibits 1, 2 and 3 be inspected in the Circuit Court of Appeals for the Fourth Circuit in connection with the appeal of said case,

It is hereby ordered, pursuant to the provisions of Paragraph 4 of Rule 14 of the Rules of the Circuit Court of Appeals for the Fourth Circuit, that said exhibits in the original form in which they were introduced in evidence be transmitted as original papers to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, together with the transcript of the record in this case.

This 25th day of April, 1933.

(Signed) H. H. Watkins, United States Judge.

[fol. 134] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

Now comes the Plaintiff, Clifton Manufacturing Company, and files the following assignments of error, upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this Court entered on the 25th day of April, 1933.

1

The Court erred in failing and refusing to render judgment for the Plaintiff upon the uncontradicted evidence.

2

The Court erred in rendering judgment for the Defendant upon the facts found.

3

The Court erred in failing and refusing to render a decree for the cancellation of the purported waivers upon the uncontradicted evidence.

4

The Court erred in failing and refusing to render a decree for the cancellation of the purported waivers upon the facts found.

5

The Court erred in overruling and denying Plaintiff's motion for judgment.

6

The Court erred in overruling and denying Plaintiff's motion for a decree for the cancellation of the purported waivers.

[fol. 135] 7

The Court erred in failing to make specific findings of fact and conclusions of law upon all questions and issues involved in this case, as required by Section 764 of Title 28 of the United States Code.

8

The Court erred in failing to pass individually upon each of Plaintiff's requests for findings of fact and conclusions of law.

9

The Court erred in holding that the statute of limitations upon the assessment and collection of income and excess profits taxes for Plaintiff's fiscal year ending March 31, 1918, began to run upon the filing of Plaintiff's income and excess profits tax return on Form 1120 on April 29, 1919, and not upon the filing of Plaintiff's duly executed and verified original income and excess profits tax returns on Forms 1031 and 1103, respectively, on May 28, 1918.

10

The Court erred in failing to find specially that the original income and excess profits tax returns on Forms 1031 and 1103, filed by Plaintiff on May 28, 1918, covered the entire fiscal year ended March 31, 1918, and showed the items of gross income, deductions, credits, net income and invested capital for the fiscal year ended March 31, 1918, and all the items of net income for the pre-war years (1911, 1912 and 1913) and invested capital for the taxable and pre-war years with such definiteness as to enable the Commissioner of Internal Revenue to compute Plaintiff's income and excess profits taxes under the Revenue Act of 1918, and the Revenue Act of 1917, and the Revenue Act of 1916 as amended, provided that the items referred to had been accepted by the Commissioner as correct.

11

The Court erred in failing to find specially that all of the information disclosed in the additional or amended [fol. 136] return on Form 1120, filed on April 29, 1919, which could be used for the computation of income and excess profits taxes under the Revenue Act of 1918 had already been disclosed in the original income and excess profits tax returns on Forms 1031 and 1103, respectively, filed on May 28, 1918.

12

The Court erred in ruling, as a conclusion of law, that the Revenue Act of 1918 requires the filing of additional

income and excess profits tax returns for a fiscal year ending in 1918 as to which complete income and excess profits tax returns had already been filed in compliance with the provisions of the Revenue Act of 1917.

13

The Court erred in finding that Plaintiff's original income and excess profits tax returns on Forms 1031 and 1103 respectively were merely tentative returns.

14

The Court erred in failing to find specially that the original income and excess profits tax returns on Forms 1031 and 1103, respectively, filed on May 28, 1918, were prepared and filed by Plaintiff in good faith and in the honest belief that all of the information therein contained was correct.

15

The Court erred in failing to find specially that each of the waivers referred to in the findings of fact was requested of Plaintiff by the Commissioner of Internal Revenue or his agents upon the false representation that at the time of the request the statute of limitations (or the statute as extended by prior waivers) for assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired.

16

The Court erred in failing to find specially that each of [fol. 137] the waivers referred to in the findings of fact was executed under a mutual mistake on the part of the Plaintiff and the Government, the Plaintiff and the agents of the Government with whom Plaintiff was dealing mistakenly believing that the statute of limitations (or the statute as extended by prior waivers) for assessment and collection of additional taxes for Plaintiff's fiscal year 1918 had not yet expired.

17

The Court erred in finding that "If a mistake existed, it was a mistake principally as to a question of law."

18

The Court erred in failing to find specially that the execution of each of the purported waivers referred to in the findings of fact resulted solely and proximately from the misrepresentations described above, and that none of said waivers would have been executed but for said misrepresentations.

19

The Court erred in failing to find specially that the execution of each of the purported waivers referred to in the findings of fact resulted solely and proximately from the mutual mistake described above, and that none of said waivers would have been executed but for said mutual mistake.

20

The Court erred in failing to find specially that at the time of the execution of each of the purported waivers referred to in the findings of fact, Plaintiff did not know that the statute of limitations had already expired, and did not know that any preceding waiver was invalid.

21

The Court erred in failing and refusing to rule that a purported waiver of the statute of limitations on the assessment and collection of additional income and excess [fol. 138] profits taxes executed by a taxpayer at a time when, unknown to him, the statutory period has expired, is invalid and affords no legal defense to the taxpayer's action to recover taxes assessed or collected after the statutory period.

22

The Court erred in failing and refusing to rule that a taxpayer, who executes such a waiver in favor of the Government after the statute of limitations has expired, at the request of a Government officer or agent, and upon the false representation by such officer or agent, that the statute of limitations has not yet expired, is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

23

The Court erred in failing and refusing to rule that where a taxpayer executes and files such a waiver with the Government as a consequence of a mutual mistake as to the expiration of the statute of limitations, both the taxpayer and the officers or agents of the Government with whom he deals mistakenly believing that the statute has not yet expired, the taxpayer is entitled in equity to relief against the use of such a waiver as a defense in the taxpayer's action at law for the recovery of taxes collected after the statutory period.

24

The Court erred in finding as a fact that "There was no such misrepresentation, mutual mistake or lack of authority as to invalidate the waivers, even if signed after the expiration of the statutory period."

25

The Court erred in holding that Plaintiff's President and Treasurer had authority to execute, on behalf of his corporation, a waiver of the statute of limitations on the assessment and collection of additional income and excess profits taxes after the statuory period had already expired.

[fol. 139] 26

The Court erred in finding that Plaintiff ratified the action of its President and Treasurer in executing the purported waivers referred to in the findings of fact.

Wherefore, Plaintiff prays that said judgment may be reversed and for such other and further relief as to the Court may seem just and proper.

This 26th day of April, 1933.

Horace L. Bomar, W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO PRINTING OF RECORD—Filed April 26, 1933

Pursuant to Section 3 of Rule 23 of the Rules of the Circuit Court of Appeals for the Fourth Circuit, the par-

ties to the above described cause, by their respective attorneys, hereby stipulate and agree that the following parts only of the transcript of record shall be printed in connection with the appeal of said cause to said Court:

(1) Petition or complaint, with all amendments thereto.
(2) Answer.
(3) Affidavit of Horace L. Bomar, attorney for Plaintiff, as to service of petition, together with acknowledgment thereon.
(4) Opinion of the District Court embracing conclusions of fact and law.
(4-a) Order for Judgment dated Jan. 31, 1933.
[fol. 140] (4-b) Order vacating Judgment (filed Feb. 2, 1933).
(5) Order and judgment of the District Court, dismissing the complaint, entered April 25, 1933.
(6) Bill of exceptions.
(7) Stipulation of counsel as to bill of exceptions.
(8) Certificate of the District Court allowing and certifying the bill of exceptions.
(9) Order of the District Court for the transmission of Defendant's Exhibits 1, 2 and 3 as original papers to the Circuit Court of Appeals.
(10) Assignment of error.
(11) Memorandum required by Section 7 of Rule 14 of the Rules of the Circuit Court of Appeals for the Fourth Circuit.
(12) This stipulation.

It is further stipulated and agreed that in so far as any equitable issues are involved in this case, the filing of this stipulation with the Clerk of the District Court may be considered a sufficient compliance with the requirement of Equity Rule 75 with respect to the service and filing of a præcipe, and the Clerk of the District Court is hereby requested by both parties to transmit to the Clerk of the Circuit Court of Appeals for the Fourth Circuit at Richmond, Virginia, only the papers designated herein.

This 26th day of April, 1933.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Plaintiff. Joseph A. Tolbert, Attorney for Defendant.

[fols. 141 & 142] IN UNITED STATES DISTRICT COURT

MEMORANDUM

(1) Petition for Appeal filed: Apr. 26, 1933;
(2) Appeal allowed: April 26, 1933;
(3) Copy of Order Allowing Appeal lodged for adverse party: Apr. 26, 1933;
(4) Appeal Bond: Dated: Apr. 26, 1933—Penalty $250.00—Obligors: Clifton Mfg. Co., principal; Fidelity & Deposit Co. of Maryland, Surety. Conditioned for: costs and damages.
(5) Citation: Dated Apr. 26, 1933; Return dated Apr. 26, 1933;

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 143] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 3510

CLIFTON MANUFACTURING COMPANY, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville. At Law

DOCKET ENTRIES

May 12, 1933, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, bond and citation are certified up under section 7 of Rule 14.

Same day, the appearance of W. A. Sutherland is entered for the appellant.

Same day, the original exhibits (Defendant's 1, 2 and 3) are certified up.

May 16, 1933, the appearance of Joseph A. Tolbert, U. S. Attorney, is entered for the appellee.

[fol. 144] May 17, 1933, the appearance of W. F. Evans, Attorney, Bureau of Internal Revenue, is entered for the appellee.

Same day, the appearance of Joseph B. Brennan is entered for the appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

PETITION OF APPELLANT THAT PRINTING OF RECORD BE HELD IN ABEYANCE, ETC.—Filed May 20, 1933

The petition of Clifton Manufacturing Company, Appellant in the above entitled and numbered cause, respectfully represents:

1

The District Court of the United States for the Western District of South Carolina granted an appeal in the above entitled cause on April 26, 1933.

2

The citation therein was signed on April 26, 1933, and was made returnable within forty days from said date.

3

The principal question involved in this case is whether the statute of limitations upon additional assessments of income and excess profits taxes for a fiscal year ending in 1918 commences to run upon the filing of the first complete return for that year prior to the passage of the Revenue Act of 1918. This identical question is also involved in the case of Globe Excelsior Oak Tanning Co. vs. United States, in which case a petition for certiorari [fol. 145] to the Court of Claims was filed in the Supreme Court of the United States on April 27, 1933 (Docket No. 916). In the event that the Supreme Court grants the

petition for certiorari in that case and finally decides said question on the merits, adversely to this Petitioner's contentions, this Petitioner would want to dismiss its appeal herein without further proceedings. In order to avoid any unnecessary expense in connection with this case, Petitioner desires that the printing of the record in this case be held in abeyance until the Supreme Court acts finally in the case of Globe Excelsior Oak Tanning Co. vs. United States, referred to above.

Wherefore, Petitioner and Appellant pray that the printing of the record in this case be held in abeyance until the Supreme Court finally acts in the case of Globe Excelsior Oak Tanning Co. vs. United States, October Term, 1932, No. 916, and that the time for Appellant to take all other steps required by Section 1 of Rule 16 of the Rules of this Court be extended accordingly for a period of 10 days after the final decision of the Supreme Court in said case.

Dated May 17, 1933.

W. A. Sutherland, Joseph B. Brennan, Attorneys for Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER DIRECTING PRINTING OF RECORD TO BE HELD IN ABEYANCE—Filed May 20, 1933

Good cause appearing therefor, and upon motion of the Appellant in the above cause, it is hereby ordered by the undersigned, Senior Circuit Judge for the Fourth Circuit, that the printing of the record in the above entitled cause be held in abeyance until the Supreme Court acts finally in the case entitled Globe Excelsior Oak Tanning Co. vs. United States, now pending in said Court and docketed as [fol. 146] No. 916, October Term, 1932, and that the time for Appellant to take all other steps required by Section 1 of Rule 16 of the Rules of this Court, be extended accordingly for a period of 10 days after the final decision of the Supreme Court in said case.

This 20th day of May, 1933.

John J. Parker, United States Circuit Judge.

IN UNITED STATES CIRCUIT COURT OF APPEALS

DOCKET ENTRIES

October 27, 1933, twenty-five copies of the printed record are filed.

December 29, 1933, the appearance of Sewall Key, Special Assistant to the Attorney General, is entered for the appellee.

Same day, stipulation as to the time for the filing of the appellee's brief is filed.

January 5, 1934, the appearance of J. L. Monarch, Special Assistant to the Attorney General, is entered for the appellee.

Argument of Cause

January 5, 1934 (January Term, 1934), cause came on to be heard before Parker and Soper, Circuit Judges, and Chesnut, District Judge, and is argued by counsel and submitted.

[fol. 147] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 3510

CLIFTON MANUFACTURING COMPANY, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville. At Law

(Argued January 5, 1934. Decided April 3, 1934)

Before Parker and Soper, Circuit Judges, and Chesnut, District Judge

W. A. Sutherland and Joseph B. Brennan (Jones, Evins, Powers & Jones and Sutherland, Tuttle and Brennan on

brief) for Appellant, and J. Louis Monarch, Special Assistant to the Attorney General (Sewall Key, Special Assistant to the Attorney General, and C. C. Wyche, U. S. Attorney, on brief) for Appellee.

PER CURIAM OPINION—Filed April 3, 1934

[fol. 148] PER CURIAM:

Clifton Manufacturing Company, a corporation, brought an action in the District Court under Section 24 (20) of the Judicial Code as amended by the Act of February 24, 1925, 43 Stat. 972, 28 U. S. C. A. 41, (20), for the refund of income and profit taxes assessed for the fiscal year ending March 31, 1918. For this fiscal year it filed a return on May 28, 1918, under the provisions of the Revenue Act of 1917, and subsequently paid the tax therein shown to be due. After the passage of the Revenue Act of 1918, approved February 24, 1919, the taxpayer filed on April 29, 1919, an additional return for the same period, showing an additional tax, which was also paid. Subsequently two additional assessments were made for the period involved, and paid under protest. The taxpayer's claim is that these assessments were made after the statute of limitations had barred the right of the commissioner to make them, and the Commissioner's answer is that on June 25, 1923, the taxpayer executed the first of a series of waivers which prevented the running of the statute. This date was more than five years after the filing of the first return on May 28, 1918—but within five years of the filing of the second return on April 29, 1919.

It is conceded that the taxpayer's right of recovery in the case depends upon whether the period of limitations ran from the filing of the first or from the filing of the second income tax return; and that if the period ran from the filing of the second return, the taxpayer has no right of action against the United States. We are in accord with the conclusion stated in the opinion of Judge Watkins in the District Court, 3 Fed. Supp. 508, cited with approval in the opinions of the United States Circuit Court of Appeals for the Ninth Circuit in Zellerbach Paper Company vs. Commissioner, — F. (2d) —, and National Paper Products Company vs. Commissioner, — F. (2d) —, filed February 28, 1934, that the period of limitations began to run

from the filing of the second return, and the judgment of the District Court is therefore affirmed.

[fol. 149] In United States Circuit Court of Appeals, Fourth Circuit

No. 3510

Clifton Manufacturing Company, Appellant,

versus

United States of America, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina

Judgment—Filed and Entered April 4, 1934

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby, affirmed.

Morris A. Soper, U. S. Circuit Judge.

April 4, 1934.

[fol. 150] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 151] Supreme Court of the United States

Order Allowing Certiorari—Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is

granted, and the case is assigned for argument immediately following Nos. 35 to 39, inclusive.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 38,774. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 146. Clifton Manufacturing Company, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed July 3, 1934. File No. 146, O. T., 1934.

FILE COPY

FILED
JUL 3 1934
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1934

No. 146

CLIFTON MANUFACTURING COMPANY

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

W. A. SUTHERLAND
JOSEPH B. BRENNAN
Counsel for Petitioner

Of Counsel:
JONES, EVINS, POWERS & JONES
SUTHERLAND, TUTTLE & BRENNAN

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1934

No.———

CLIFTON MANUFACTURING COMPANY

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

Clifton Maunfacturing Company, a corporation, by its counsel, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above case on April 4, 1934, (R. 149), affirming the judgment of the United States District Court for the Western District of South Carolina (R. 82).

QUESTION PRESENTED

Did the statute of limitations upon the assessment and collection of additional income and excess profits taxes for Petitioner's fiscal year ended March 31, 1918, begin to run upon the filing of Petitioner's original income and excess profits tax returns for that year on May 28, 1918, prior to the enactment of the Revenue Act of 1918?

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, pp. 10-13, *infra.*

STATEMENT

Petitioner brought suit against the United States to recover income and excess profits taxes for the fiscal year ended March 31, 1918, which Petitioner alleged had been collected after the expiration of the statute of limitations. (R. 1). Petitioner filed its original income and excess profits tax return for its fiscal year ended March 31, 1918, on May 28, 1918. (R. 62). The Revenue Act of 1918 was approved on February 24, 1919, and was made applicable retroactively to fiscal years ending in 1918. See Sections 200, 205(a), pp. 11, 12, *infra.* Petitioner filed an additional or amended income and profits tax return for said fiscal year on April 29, 1919. (R. 4, 45, 62). The amended return showed an additional tax resulting from the increased rates imposed by the 1918 Act, but the information and data upon which the tax was computed were exactly the same as that already disclosed in the original returns. (R. 4, 5, 46).

It is undisputed that the applicable period of limitation on assessment and collection was five years from the filing of whatever returns started the running of the statute.[1]

On June 21, 1923, which was more than five years after the filing of the original returns, but less than five years after the filing of the amended return, the Commissioner requested Petitioner to execute the first of a series of purported waivers of the limitation period on assessment and collection. (R. 63). Subsequently, the Commissioner made an assessment in September, 1926, and collections in September and October, 1926 (R. 62), the validity of which would depend upon whether the purported waivers were valid and not voidable.

Petitioner contended that the purported waivers were invalid because executed under a mutual mistake of the parties and misrepresentation by the Government agents to the effect that the limitation period, provided by the statute or by valid existing waivers, had not expired when each of the purported waivers was requested. (R. 11-16, 40-43). Pursuant to Section 274(b) of the Judicial Code (28 U. S. C. Sec. 398), Petitioner prayed for equitable relief against the defense of waiver (R. 10, 17, 18), if the Court should consider the purported waivers valid at law.

---

[1]See Section 250(d) of the 1918 and 1921 Acts, Section 277(a)(2) of the 1924 Act and Section 277(a)(3) of the 1926 Act, p. 10, *infra*.

The District Court held that the limitation period did not begin to run until the filing of the amended return, and that therefore it had not expired when the first of the purported waivers was requested and filed. (R. 71-76). In view of this holding, the District Court pointed out that questions of mutual mistake and misrepresentation became moot (R. 77), and judgment was rendered against Petitioner (R. 82).

The judgment of the District Court was affirmed by the Circuit Court of Appeals in a per curiam opinion, holding that the period of limitations did not begin to run until the filing of the amended return, and relying upon the recent decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *Zellerbach Paper Company v. Helvering*, 69 F. (2d) 852, and *National Paper Products Company v. Helvering*, 69 F. (2d) 857. (R. 148).

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that the statutory period of limitation on assessment and collection of income and profits taxes for Petitioner's fiscal year ended March 31, 1918, did not begin to run upon the filing of Petitioner's original income and profits tax returns on May 28, 1918.

2. The Circuit Court of Appeals erred in holding that the statutory period of limitation on assessment and collection of income and profits taxes for Petitioner's fiscal year ended March 31, 1918, began to run upon the filing of Petitioner's amended return on April 29, 1919.

REASONS FOR GRANTING THE WRIT

1. The question involved in this case is substantially the same as the question involved in the cases of *Zellerbach Paper Company v. Helvering* and *National Paper Products Company v. Helvering*, October Term 1934, Nos. 35-39, in which cases this Court granted writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit on June 4, 1934.

2. The decision of the Circuit Court of Appeals in this case is in conflict with the following decisions of other federal appellate courts: *Myles Salt Co. v. Commissioner*, 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co. v. Burnet*, 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co. v. Commissioner*, 52 F. (2d) 346 (C. C. A. 8th).

3. In holding that the statutory period of limitation on assessment and collection of income and profits taxes for a fiscal year ending in 1918 does not begin to run upon the filing of the original returns filed for such year prior to the enactment of the Revenue Act of 1918, the Circuit Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by this Court.

Wherefore, it is respectfully prayed that the petition be granted.

W. A. SUTHERLAND
JOSEPH B. BRENNAN
Atlanta, Georgia
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 59) is reported at 3 F. Supp. 508. The opinion of the Circuit Court of Appeals (R. 147) is reported at 70 F. (2d) 102.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1934. (R. 149). Jurisdiction is conferred upon this Court by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED, STATUTES INVOLVED, ETC.

A statement of the question presented, specification of errors, and a statement of the case will be found in the petition. The statutes involved appear in the Appendix.

ARGUMENT

The question involved in this case is substantially the same as the question involved in the cases of *Zellerbach Paper Company v. Helvering* and *National Paper Products Company v. Helvering*, October Term 1934, Nos. 35-39, in which cases this Court granted writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit on June 4, 1934. Nos. 35 and 36 involve 1925 fiscal years and Nos. 37, 38 and 39 involve 1921 fiscal years, but the language of the pertinent statutory provisions is the same and the applicable principles are the same as those material to the present case, which involves a 1918 fiscal year.

The decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases cited above were relied upon by the Circuit Court of Appeals for the Fourth Circuit in the case at bar. (R. 148). In Nos. 37, 38 and 39 the Circuit Court of Appeals for the Ninth Circuit relied upon the decision of the District Court in the case at bar. See *Zellerbach Paper Company v. Helvering*, 69 F. (2d) 852, 855. In referring to the reasoning of the District Court in the case at bar, Circuit Judge Wilbur, in the *Zellerbach Paper Company* case, says:

> "It is sufficient for our purposes to state that that reasoning is in the main applicable to the effect of similar provisions in the Revenue Act of 1921 as related to the superseded Revenue Act of 1918 and the regulations thereunder." 69 F. (2d) at 856.

In the *Zellerbach Paper Company* cases, Nos. 37, 38 and 39, the Solicitor General filed a memorandum for the respondent, acquiescing in the petition for writs of certiorari, and stating that the decisions of the Circuit Court of Appeals in those cases are supported by the decision of the Circuit Court of Appeals for the Fourth Circuit in the case at bar.

The decision of the Circuit Court of Appeals in this case is in conflict with the decisions of three other federal appellate courts involving 1921 fiscal years. See *Myles Salt Co. v. Commissioner*, 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co. v. Burnet*, 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co. v. Commissioner*, 52 F. (2d) 346 (C. C. A. 8th). In the first two of the cases just cited, the Courts relied largely upon

what they considered indisputable principles relating to 1918 fiscal years. See *Myles Salt Co. v. Commissioner*, 49 F. (2d) at 233; *Isaac Goldmann Co. v. Burnet*, 51 F. (2d) at 428.

The District Court in this case suggested a possible distinction from the three cases cited in the preceding paragraph on the grounds that in these cases no new return was filed after the enactment of the new act and the only material change effected by the new act was the disallowance of a credit which was apparent on the face of the original return. (R. 74, 75). But such suggested distinctions were rejected by the Circuit Court of Appeals for the Ninth Circuit. See *National Paper Products Company v. Helvering*, 69 F. (2d), 857, 863.

It is admitted by the pleadings in the case at bar that the original return contained all of the information and data which were disclosed on the additional or amended return and that the additional tax shown by the amended return resulted solely from the increased rates imposed by the new act. R. 4, 5, 46).

The importance of the question involved in this case is apparent from the fact that the same question, based upon the same principles and similar language in the applicable statutory provisions, arises with respect to other fiscal years where returns are filed prior to the enactment of a new revenue act which becomes applicable retroactively to such fiscal years. All of the modern revenue acts have been made applicable retroactively at least to the begin-

ning of the calendar year in which they have been adopted. It is important therefore that this court settle the question involved in this case.

CONCLUSION

It is submitted that the decision of the Circuit Court of Appeals in this case is in conflict with the decisions of three other federal appellate courts; that the question is an important one of federal law; and that it is substantially the same as the question involved in other cases which are pending before this Court on writs of certiorari which have already been granted.

Respectfully submitted,

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APPENDIX

Revenue Act of 1921, 42 Stat. 227:

> Sec. 250(d). The amount of income, excess-profits, or war-profits taxes due under any return made * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, * * * and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed.

Revenue Act of 1924, 43 Stat. 253:

> Sec. 277(a)(2). The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed * * *

Revenue Act of 1926, 44 Stat. 9:

> Sec. 277(a)(3): The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1916, the Revenue Act of 1917, and by any such Act as amended, shall be assessed within five years after the return was filed * * *

Revenue Act of 1918, 40 Stat. 1057, and Revenue Act of 1921, 42 Stat. 227:

> Sec. 239. That every corporation subject to taxation under this title * * * shall make a re-

turn, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer.

Revenue Act of 1918, 40 Stat. 1057:

Sec. 205(a). That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such priod falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period: *Provided*, that in the case of a personal service corporation the amount to be paid shall be only that specified in clause 1.

Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917, and by Title I of the Revenue Act of 1917, shall be credited towards the payment of the tax imposed for such fiscal year by this act, and if the amount so paid exceeds the amount of such tax imposed by this act, or, in the case of a personal service corpora-

Revenue Act of 1921, 42 Stat. 227:

> tion, the amount specified in clause 1, the excess shall be credited or refunded in accordance with the provisions of Section 252.
>
> Sec. 205(a). That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period.
>
> Any amount paid before or after the passage of this Act on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of section 252.

Revenue Act of 1918, 40 Stat. 1057:

> Sec. 200. * * * The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918.

Revenue Act of 1921, 42 Stat. 227:

> Sec. 200. * * * The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921.

Revenue Act of 1918, 40 Stat. 1057, and Revenue Act of 1921, 42 Stat. 227:

> Sec. 227(a). That returns * * * shall be made on or before the fifteenth day of the third month following the close of the fiscal year * * * .

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CHARLES ELMORE C

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 146.

CLIFTON MANUFACTURING COMPANY, *Petitioner,*

vs.

UNITED STATES OF AMERICA.

REPLY MEMORANDUM FOR PETITIONER.

W. A. SUTHERLAND,
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Atlanta, Georgia.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1934.

No. 146.

CLIFTON MANUFACTURING COMPANY, *Petitioner,*

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UNITED STATES OF AMERICA.

REPLY MEMORANDUM FOR PETITIONER.

In the memorandum for the United States filed in this case, the Solicitor General has stated that the point involved in this case is "so closely related to the questions involved in *National Paper Products Co.* v. *Helvering,* Nos. 35, 39, October Term 1934, and *Zellerbach Paper Co.* v. *Helvering,* Nos. 36-38, October Term 1934, in which certiorari was granted on June 4, 1934", that the Government does not oppose the present petition. However, the Solicitor General recommended that the Court defer action on the petition in this case until after it has decided the above cases. He states further that if those cases are decided in favor of the Government, the petition should be denied; but that if they are decided against the Government, the petition should be granted and this case reversed and remanded to the Circuit Court of Appeals.

We agree that the question involved in the present case is substantially the same as the question involved in the cases in which certiorari has already been granted and that all of the cases should be decided the same way. If the cases referred to were to be presented upon this assumption, we would agree with the suggestion made by the Solicitor General in his memorandum in the present case.

However, in the briefs filed by the Petitioners in the cases of *National Paper Products Co.* and *Zellerbach Paper Co., supra*, an attempt is made to distinguish the present case from those cases on the ground that the question involved for 1918 fiscal years under the 1918 Act is not the same as the question involved for 1921 and 1925 fiscal years which are governed respectively by the Revenue Acts of 1921 and 1926. In attempting a distinction between the years, where no valid distinction exists, the Petitioners in those cases have failed to recognize some of the most important considerations which should be placed before this Court in connection with this whole group of cases.

In order that full consideration may be given to all aspects of the case, Petitioner respectfully requests that its petition be granted immediately and the present case advanced for argument along with the cases of *National Paper Products Co.* and *Zellerbach Paper Co., supra.* We are certain no inconvenience to the Government will be involved in this handling of the matter.

Respectfully submitted,

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Counsel for Petitioner,
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CHARLES ELMORE

IN THE

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OCTOBER TERM, 1934.

No. 146.

CLIFTON MANUFACTURING COMPANY, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the District Court (R. 50-69) is reported in 3 F. Supp. 508. The opinion of the Circuit Court of Appeals (R. 120-122) is reported in 70 F. (2d) 102.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 4, 1934 (R. 122). Petition for writ of certiorari was filed July 3, 1934, and the writ was granted October 8, 1934 (R. 122). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT OF THE CASE.

Petitioner, a corporation, brought an action in the District Court under Section 24(20) of the Judicial Code as amended by the Act of February 24, 1925, 43 Stat. 972, 28 U. S. C. Sec. 41 (20), for the refund of income and profit taxes assessed and collected for the fiscal year ending March 31, 1918. For that fiscal year Petitioner filed a return (R. 16-22) on May 28, 1918 and subsequently paid the tax therein shown to be due, approximately $171,000.00 (R. 72). After the passage of the Revenue Act of 1918, approved February 24, 1919, Petitioner filed on April 29, 1919, an additional return for the same period. (R. 72, 85-89.) The second return contained identically the same information as was disclosed by the first return (R. 3, 4, 38), and the additional tax of approximately $50,000,00 shown by the second return was due entirely to an increase in rates (R. 4, 5, 38). This additional tax was paid in due course (R. 72), and thereafter two additional assessments amounting to approximately $135,000.00 were made, and were paid under protest in 1926 (R. 6, 7, 40). A purported waiver of the statute of limitations was given by Petitioner on June 25, 1923, which, if valid, was kept in force through 1926 by subsequent waivers (R. 9-13). The only question now before this Court is whether or not the statute of limitations had already expired on June 25, 1923. If the first return started the running of the statute, it had then expired. If the statute did not begin to run until the filing of the second return, the statute had not then expired.

The District Court held that the statute ran only from the filing of the second return and that it had not expired on June 25, 1923 (R. 61-66). The Circuit Court of Appeals affirmed this decision on the authority of the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *Zellerbach Paper Co.* v. *Helvering* and *National Paper Products Co.* v. *Helvering,* 69 F. (2d) 852 and 69 F.

(2d) 857, now pending in this Court, Nos. 35-39. (R. 121).

The grounds of Petitioner's attack upon the waivers given by Petitioner will not be discussed here, since the Petitioner and Respondent are agreed that the validity of the waivers is a matter to be decided by the Circuit Court of Appeals, if this Court holds that the statute of limitations had run on June 25, 1933 (Memorandum for the United States).

STATUTES INVOLVED.

The statutes and Treasury Decisions involved appear in the Appendix, where they do not appear in the body of the brief.

QUESTIONS PRESENTED.

Where complete income and excess profits tax returns for a fiscal year ended March 31, 1918, were filed on May 28, 1918 prior to the passage of the Revenue Act of 1918, and subsequently, on April 29, 1919, after the passage of the Revenue Act of 1918, a return showing the same information and a higher tax was filed, did the statute of limitations upon the assessment and collection of additional income and excess profits taxes begin to run upon the filing of the first or upon the filing of the second return?

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the statutory period of limitation on assessment and collection of income and profits taxes for Petitioner's fiscal year ended March 31, 1918, did not begin to run upon the filing of Petitioner's original income and profits tax returns on May 28, 1918.

2. The Circuit Court of Appeals erred in holding that that statutory period of limitation on assessment and collection of income and profits taxes for Petitioner's fiscal year ended March 31, 1918, began to run upon the filing of Petitioner's amended return on April 29, 1919.

ARGUMENT.

Introduction.

The question as to when the statute of limitations on the collection of additional taxes begins to run is purely a question of the construction of the applicable statutes, since Congress can make any provision it may choose. The statutes of limitation in tax cases are made to run from the filing of "the return". Neither in the Limitation provisions nor elsewhere do the taxing acts, either for calendar or fiscal years, define what is meant by "the return". It is therefore necessary, in order intelligently to interpret the statute, to consider the relevant administrative rulings and the subsequent legislative affirmation or lack of affirmation of the interpretations set forth in these rulings; and also to consider fully the practical considerations that require one or another construction, certainly insofar as these practical considerations must be presumed to have been before Congress at the time of the enactment of the limitation provisions in question.

Three Federal appellate courts have decided similar cases in accordance with Petitioner's contentions,[1] and the opinions in those cases contain logical and forceful arguments in favor of Petitioner's position, based upon an interpretation of the statutory provisions in the light of careful analysis of the language used therein. The opinions in

[1] *Myles Salt Co.* v. *Commissioner*, 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co.* v. *Burnet*, 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co.* v. *Commissioner*, 52 F. (2d) 346 (C. C. A. 8th).

all three of those cases are copied in full in appendices to petitioner's briefs in Nos. 35-39. We shall assume that the arguments based upon a study of the statutory language alone will be covered before this case is reached, and our consideration of that subject will be very brief.

The administrative interpretation of the various Revenue Acts, so far as those interpretations relate to the matter here involved, is not fully discussed elsewhere, nor is there any discussion, other than in the *Myles Salt Co.* case, *supra,* of any legislative recognition of this administrative construction. Even where certain administrative interpretations are mentioned and relied upon, the basis for the rulings and their purpose and effect is not fully developed. We shall seek to develop this subject fully.

The practical considerations which require a holding that the statute begins to run from the filing of the first return, both because such holding works no undue hardship upon the Government and because a contrary holding, no matter how limited, would work unreasonable hardship upon many thousands of taxpayers by keeping old tax returns open until the present time, have never been properly developed and do not seem to have been fully understood. The failure to understand fully these practical considerations has no doubt been largely responsible for the lack of understanding of the true purpose and effect of the Treasury Decisions with reference to additional returns.

All the cases now before the Court are alike in all respects here essential.[2] They all involve fiscal years where there was a transition from one Revenue Act to another. In none of them was any new information required in the new return. While in all the transition years there were some differences between the Acts, the information re-

[2]We assume that the return filed in Nos. 37-39 would have been sufficient to start the running of the statute if filed after the 1921 Act was passed. That seems to have been the assumption of the Circuit Court of Appeals for the Ninth Circuit, although it seems to be questioned in the Government Brief in this Court. This Petitioner is not interested in that question.

quired to compute taxes under the two Acts in the case of substantially all taxpayers was practically identical. In any event, the differences in information required as between the different acts in all of the years in question was negligible in comparison with the errors that normally appear in returns filed under a single act. In all cases, statutory provisions covering fiscal years, returns, and periods of limitation, and the Treasury Decisions requiring returns of additional taxes under the later act in these transition periods, were substantially identical.[3] In view of the conceded similarity of the cases, we shall discuss them in a group in such manner as best serves to make our contentions clear.

1. Discussion of limitations and other statutory provisions.

The statute primarily to be construed in each of these cases is the limitations statute. The taxing provisions of the acts involved are important only insofar as they serve as an aid to construction of the limitations statute. In this case, and in Nos. 37-39, the limitations provisions are in entirely separate acts from the taxing provisions involved and were enacted subsequent to the enactment of the taxing acts and subsequent to the issuance under those acts of the Treasury Decisions with reference to additional returns of additional taxes.

The limitations provision in question in this case is Section 250 (d) of the Revenue Act of 1921, which provides as follows:

> "The amount of income, excess-profits, or war-profits taxes due under any return made . . . under

[3]We do not consider in this Brief cases where these various points of similarity do not exist, such as the *Updike* cases referred to in the Government Brief, in Nos. 37-39, involving a transition from 1916 to the 1917 Act, and which were decided by the Circuit Court of Appeals for the Eighth Circuit, which also decided the case of *Valentine-Clark Co.* v. *Commissioner*, *supra*.

> prior income, excess-profits, or war-profits tax Acts . . . shall be determined and assessed within five years after *the return was filed*, . . . and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts . . . shall be begun, after the expiration of five years after the date *when such return was filed.*" (Italics ours).

Section 277 (a) (3) of the 1926 Act, which is substantially identical, provides as follows:

> "The amount of income, excess-profits, and war-profits taxes imposed by . . . the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years *after the return was filed*, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period." (Italics ours).

The difficulty is in determining what is meant by "the return". The Circuit Court of Appeals for the Ninth Circuit concedes that "the meaning of the word 'return' has never been legislatively defined, and hence the courts have been required to define the term as applied to specific cases presented to them." (No. 37, Record, p. 128).

The taxing statute involved in this case, Revenue Act of 1918, Section 239 (a), requiring corporation returns, provides as follows:

> "Sec. 239 (a). That every corporation subject to taxation under this Title . . . shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this Title."[4]

The Government's argument is that no return filed before the passage of the 1918 Act can fulfill the requirement of a

[4]The provisions for a profits tax return are substantially identical. Revenue Act of 1918, Sec. 336.

return under the 1918 Act, the theory apparently being that only by conscious effort to comply specifically with each and every provision of the 1918 Act can a return such as is contemplated by that Act be filed. This was the view of the Circuit Court of Appeals for the Ninth Circuit (No. 37, Record 128-135), and was apparently the view of the District Court in this case (R. 65).

A much stronger argument on the basis of the technical construction of the language of the statute is made in favor of Petitioner's position by the Circuit Courts of Appeals in the *Myles Salt Co.* and *Valentine-Clark Co.* cases, *supra,* where the Circuit Courts of Appeals refer to section 227 (a) of the 1921 Act[5] which requires the return to be filed within two months and fifteen days after the end of the taxable year. Those courts conclude that since Congress made no special provision to the contrary for 1921 fiscal years, where returns were past due under the terms of section 227 (a) when the 1921 Act was passed, the Act necessarily must be construed as adopting the returns already filed. (Brief of Petitioners, Nos. 37-39, pp. 61, 74.)

The Government's argument and the reasoning of the Circuit Court of Appeals for the Ninth Circuit assumes that the only kind of a return which can start the running of the statute of limitations is one filed in strict conformity with the requirements of Section 239 (a). Such a construction would make perfect accuracy and completeness necessary to a return. It is clear that there is no such requirement. It was held by this Court, in the case of *Florsheim Brothers* v. *United States,* 280 U. S. 453, that a so-called "tentative return", which is not intended as a basis for assessment, will not start the running of the statute of limitations. Nor will the statute run from a return which is not sworn to as the Act requires. *Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245. But this Court in the *Florsheim Brothers* case, *supra,* fully recognizes that a return may be defective and

[5]Section 227 (a) of the 1918 Act is identical. See Appendix, p. 26.

still be sufficient to start the running of the statute of limitations. The return in that case did not comply with the essential requirements of a return under any Act and was not intended as a basis for assessment, while here there is no doubt that the return was intended when filed to be a final return, and that it was sufficient, without question, had it been refiled after the passage of the 1918 Act, to start the running of the statute of limitations. Such a return, although filed before the 1918 Act was passed, complies with the requirements of the 1918 Act sufficiently to start the running of the limitations period.

The weight of the arguments on the basis of a technical construction of the language of the statute is sufficient to require a conclusion in Petitioner's favor. This is certainly true when it is remembered that limitations provisions, like other provisions of taxing statutes, are to be construed liberally in favor of taxpayers. *Bowers* v. *New York and Albany Lighterage Co.*, 273 U. S. 346, 349; *United States* v. *Updike*, 281 U. S. 489, 496.

When such a conclusion is confirmed by administrative interpretation, subsequently approved legislatively, and by all the practical considerations which will be shown to bear on the matter, there can be no doubt as to the propriety of the construction for which we contend.

Before leaving a discussion of the meaning of the statutes based solely upon a study of the statutory language, we wish to answer the arguments made against our contentions on pages 8 and 9 of the Government Brief in Nos. 37-39. The Government argues that it would follow from petitioners' contentions that the limitation period would have unequal application. As the Solicitor-General there states the point (at p. 9):

> "As to returns filed subsequent to the enactment of the law, it would be effective only upon the expiration of four years, whereas to others it would constitute a

> bar within a shorter period, dependent upon the length of time 'the return' was made before the enactment of the law."

Such clearly was intended to be the result. The situation suggested must exist in millions of cases clearly falling within the provisions of Section 250 (d) of the 1921 Act. That section imposed the first time limitation upon the collection of taxes for 1917 and prior years, and the period was dated from the filing of returns, which in the usual case had been filed years before the act was passed.

The Government argues further that petitioners' contentions must necessarily proceed upon the assumption that a limitation may operate against a liability before the liability itself has arisen, and the Government urges that this assumption is unsound, citing *Borer* v. *Chapman*, 119 U. S. 587, 602. It is submitted that the case cited was based upon a *construction* of the statute of limitations there involved and is not authority against the Petitioner's contention in the present case. There is certainly no reason why Congress could not, if it wanted to, provide that the limitation against the assessment of taxes should run from an event which preceded the liability for the taxes. Such a situation is not usual, but it is not unique. For example, the one year limitation period in the Hurd Act (40 U. S. C. sec. 270), which is applicable to independent suits by materialmen, begins to run upon final settlement by the Government with the principal contractor, although such suits cannot be commenced until six months after such settlement. See also: *Flint* v. *N. Y., N. H. and H. R. R. Co.*, 283 U. S. 53.

2. Interpretation of Treasury Decision 2797 and its effect on the construction of subsequent limitation provisions.

Fifteen days after the enactment of the Revenue Act of 1918, the Treasury issued Treasury Decision 2797, which reads as follows:

> "If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the Revenue Act of 1917, *and is subject to additional tax* for the same period under the revenue act of 1918, *the returns covering such additional tax* shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the *original return* and additional tax due under the *amended return,* will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918." (Italics ours.)

It will be noted that far from treating the original return as a nullity, this Treasury Decision clearly recognizes the return already filed as the original return, and requires a new return only for the additional tax. In view of this requirement, it seems only significant of the true situation that the Treasury Decision refers to the first return as the "*original return*" and to the second return as the "*amended return*".[6] The use of this language is relied upon by all of the appellate courts in the three cases

[6]It is of course recognized by this Court in the *Florsheim Brothers* case, *supra*, that an amended return does not toll the running of the limitations period.

in Petitioner's favor cited in footnote 1, *supra*, p. 4. See Brief for petitioners in Nos. 37-39, pp. 62, 66-67,[7] 74.

The Government now contends that the 1918 Act requires a new return after its enactment in every case and suggests that Treasury Decision 2797 was liberal in "*waiving*" that requirement in certain cases. If the statute required a new return in every case, we find no authority for the Treasury Department to waive a return and cause the statute of limitations to run from a time other than that specified by Congress. If, however, there was such authority in the Treasury Department, it equally had authority to treat the first return as the "*original*" return in all cases, and where a new return was required to treat the new return as an "*amended*" return. We have shown, however, that the statute did not require a new return and there is therefore no question of the right of the Treasury Department to waive such requirement. Treasury Decision 2797 was promulgated for the practical purpose of collecting promptly large additional taxes the collection of which could not otherwise be readily made, and therefore required additional returns to show additional taxes where additional taxes were due under the later Act. Where there was no new revenue act, but taxpayers generally had misconstrued

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[7]The following is from the opinion of Judge Groner in the *Isaac Goldmann Co.* case, *supra:*

"The new act provided the occasion, and the return furnished the basis, and the act itself imposed on the Commissioner (250 (b) Revenue Act 1921) the duty of examination to the end that the correct tax should be ascertained. The retroactive provisions of the 1921 Act present no novelty, for the 1918 Act itself replaced retroactively the 1917 Act. Under the provisions of the 1918 Act, the tax was increased over that exacted under either the 1916 or 1917 Act, but, under its provisions as to filing returns on the fiscal year basis, the Commissioner ruled (Treasury Decision 2797) that the new return required was satisfied by inclusion only of the items embracing the additional tax, and spoke of the former returns, i. e., those filed before the Act was approved, as original returns, and the additional returns required as supplemental or amended returns, and while we do not invoke this use of words as foreclosing the question or as controlling, we nevertheless think it clearly reflects the real situation, and that, in this aspect, the returns filed by appellant were, especially in view of the admission that they were in all respects honestly believed to represent the true state of appellant's liability, valid returns and not a nullity."

the law, Treasury Decision 3220 (Appendix, p. 28) was issued requiring additional returns from those who had in error computed invested capital on a valuation basis. The authority for issuing both regulations is derived from Section 1307 of the 1921 Act and Section 1305 of the 1918 Act, which are identical. Section 1305 of the 1918 Act reads as follows:

> "Sec. 1305. . . . Whenever in the judgment of the Commissioner necessary, he may require any person, by notice served upon him, to make a return or such statement as he deems sufficient to show whether or not such person is liable to tax."

We cite Treasury Decision 3220 only to show that the fact that additional returns may be required does not indicate that the first return is a nullity. Nor are additional returns required only in fiscal years between two acts.

If the Commissioner had required additional returns for the purpose of auditing the returns, the Treasury Department would have required new returns in each case where there was additional information necessary under the later act, whether in favor of or against the taxpayer, and whereever there was a change in tax liability, upward or downward; because it has long been the announced and followed policy of the Treasury Department to correct mistakes appearing on returns in favor of as well as against the Government, and the Commissioner would have wanted new returns showing all aditional information in all cases. When the Treasury Department makes the requirement of a new return dependent upon *additional taxes* being due and not upon the basis of additional information being required, it must be clear that the purpose of the Treasury Decision is the collection of additional taxes, and that the matter of audits and of the statute of limitations is not involved in the requirement, and that the use of the words "*original returns*" and "*amended return*" is clearly indicative of the true situation.

In the light of this formal interpretation by the Treasury Department of the 1918 Act, as applied to 1918 fiscal years, in force from the time the 1918 Act was passed, Congress in re-enacting into the 1921 Act provisions as to returns and fiscal years substantially identical with those in the 1918 Act and in enacting at the same time the limitation provision here in question, Section 250 (d) of the 1921 Act, *supra*, p. 6, must clearly be held to have confirmed the Commissioner's original interpretation of the 1918 Act as adopting the returns filed prior to the passage of that Act as "the return" of the taxpayer. *United States* v. *Falk*, 204 U. S. 143; *Stairs* v. *Peaslee*, 18 How. 521; *United States* v. *Cerecedo Hermanos y Compania*, 209 U. S. 337; *National Lead Co.* v. *United States*, 252 U. S. 140, 146-147. This necessarily means that any subsequent return required by the Commissioner in this class of cases just as in any other case, should be treated as an amended return.

Another related and well-recognized principle is that Congress must be presumed to have legislated with knowledge of the existing established usage of an executive department of the Government. *United States* v. *Bailey*, 9 Pet. 238, 256. Under this principle it must be clear beyond any doubt that when Congress enacted the limitations provision in Section 250 (d) of the 1921 Act and provided that the period should date from the filing of the return, Congress must have had reference to the "return" which the Treasury Department in a formal Treasury Decision recognized as the "original" return in the case of a 1918 fiscal year and not to the return which is there characterized as an "amended" return.[8]

Petitioner's construction of Treasury Decision 2797 under the 1918 Act, which is the same as that adopted in

[8]This principle of construction recently has been properly limited by this Court to the extent of presuming Congressional familiarity only with such formal pronouncements as Treasury Decisions and regulations but not with office decisions, General-Counsel's memoranda, etc. *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 468.

the three appellate court decisions in Petitioner's favor[9] is borne out by the further history and by regulations of the Treasury Department in the transition years of the other acts involved in these cases. Fiscal years in the transition between the 1918 and 1921 Acts are covered by Treasury Decision 3310 (Appendix p. 27), those between the 1924 and 1926 Acts by Treasury Decision 3843 (Appendix, p. 28). All of these Treasury Decisions are substantially the same. All of them require returns of "*additional taxes*" where *additional* taxes are due under the later act and clearly make no requirement of an additional return where additional taxes are not due.

3. Practical considerations in support of petitioner's position.

We submit that the position of the taxpayers in this group of cases is clearly established by the arguments heretofore made upon the basis of a construction of the statutory provisions in the light of the language used therein, the administrative practice thereunder, and the Congressional action in re-enacting the same provisions in later acts. But if there should be any possible doubt as to the proper construction of the statutes, such doubt should be dispelled by the strong, *practical* considerations that call for a ruling that the limitation period runs from the filing of the first return in these cases.

The Government here contends, as has been pointed out, that in the case of a fiscal year for which a complete return was filed prior to the passage of an act which was made applicable retroactively to such year, the limitation period runs only from a return filed after the passage of such act. Where no new return is filed after the passage of such act, the Government contends that there is no limitation on assessment and collection. Such is the situation in the *Na-*

[9]See footnote 1, *supra*.

tional Paper Products Co. and *Zellerbach Paper Co.* cases involving 1921 fiscal years (Nos. 37-39). The Government's argument logically goes to the extent of denying that the limitation period can run from the return filed prior to the enactment of the later act, even where no additional tax is imposed by the new act.[10]

In this connection, it should be remembered that the Treasury Decisions promulgated with reference to fiscal years ending in 1918, 1921 and 1925 required additional returns only where additional taxes were imposed as a result of the change of law. As a result, hundreds of thousands of taxpayers have relied upon these Treasury Decisions and have failed to file new returns where no additional taxes were imposed. If the Government's argument should be accepted in the cases now before the Court, hundreds of thousands of taxpayers will be deprived of the benefit of any limitation period on assessment and collection of taxes for those years, because they relied upon the Treasury Decisions and have filed no additional returns where the Treasury Decisions impliedly directed that such returns were unnecessary. If this Court should rule, as the Government here urges, the Commissioner will be free to re-open many thousands of cases long since considered closed by both the Commissioner and taxpayers.[11] Taxpayers would be at the mercy of the Commissioner, who would be in a position to go back ten or fifteen years or longer to make additional assessments which carry pre-

[10]The Board of Tax Appeals holds against the Government's contention in cases involving these particular circumstances. See cases cited in the second paragraph of footnote 9 of page 11 of the Government Brief in Nos. 37-39, which are more fully discussed hereafter. The Government Brief in Nos. 37-39 shows clearly that the Government contends that the filing of a new return is necessary in all cases where the new act becomes applicable retroactively, whether or not additional taxes are imposed by the new act.

[11]The Commissioner has acquiesced in the Board of Tax Appeals' decisions holding that the limitation period begins to run upon the filing of the first return for a 1921 fiscal year prior to the passage of the 1921 Act where no additional taxes were imposed by that Act. See footnote 22, *infra*.

sumptive validity and which the taxpayers would have the burden to overcome at a time when memories are stale and books and records are lost. If there were any doubt as to the meaning of the statutes, they should certainly be construed so as to avoid such an intolerable situation.[12] Indeed such a result is unthinkable and would defeat entirely in this class of cases the beneficent purposes of the limitations provisions. It is made clear below that no requirement of justice to the Government requires the holding for which Respondent contends.

It may be suggested—although the Government does not now suggest—that this intolerable result may be avoided by holding, as the Board of Tax Appeals has held, that where no additional tax is imposed by the later act the statute of limitations begins to run from the filing of the first return.[13] This holding of the Board is contrary to its holding where additional taxes are due under the later Act.

The view taken by the Board is not only without logical support but involves serious practical difficulties and results in untold confusion, if not in almost as great injustice as the result suggested above. If the Board of Tax Appeals is correct in holding that the first return in such cases starts the limitations period where no additional tax is imposed by the later act but not where such act does impose additional taxes, the taxpayer would be at his peril to determine with absolute accuracy all the possible differences between the acts in question in order to decide whether an additional tax (however small in amount) was due, so as to make a new return necessary. Moreover, and perhaps more important, the Commissioner himself would have no way of knowing whether the limitations period began to run in any case from the first return, unless he made a com-

[12] "Doubt, if there be any, is not likely to survive the mischiefs certain to be engendered by any other ruling." *Woolford Realty Co.* v. *Rose*, 286 U. S. 319, 329.

[13] See pages 23, 24, *infra*, and footnote 22.

plete audit, since without such investigation he could not be sure that an additional return was required, whether or not one had been filed. To be on the safe side, the Commissioner would have to complete his audit within the limitation period from the first return; and if he did this he could assess the tax within that time. It would be difficult to believe that Congress intended to lay down any such impractical rule to govern a determination of the running of the statute of limitations, a matter which requires, for all purposes of protection to the Government and taxpayer, a thoroughly practical and workable rule.

If the Board's distinction be adopted, it must then be determined whether that distinction is to be based upon actual facts or upon the assumption that the information disclosed in the first return is correct. The Board has held that a new return is required only where, upon the assumption that the information contained on the first return is correct, an additional tax would be due under the later act. *Palmetto Coal Co.*, 11 B. T. A. 1154. In other words, the Board holds that, although on the true facts a new return under the later act would show additional taxes due to changes in the law, no new return will be required if an additional tax will not be shown on the basis of the assumption of the correctness of the facts stated in the original return. That would result in the absurdity of having the limitations period run against the Government in many cases where incorrect returns were filed, so that it would have been more difficult for the Government to find out whether additional taxes were actually due under the later act, on the basis of the true facts; whereas an absolutely correct return showing on its face that additional taxes are due under the later act, and maybe the exact amount of the additional taxes due, would not be sufficient to start the running of the statute of limitations because the taxpayer

did not go through the useless formality of filing a new return after the passage of the later act.[14]

If there were any practical considerations or considerations of fairness which would require a holding that the statute of limitations should not begin to run upon the filing of the first return but only upon the filing of the second return, the Court might seek for some means of sustaining the Government's position. There are no such practical considerations or considerations of fairness which require any such result. As a matter of fact, as has been pointed out above, there was no practical reason for a new return so far as affording a basis for the Commissioner's audit was concerned; because the differences in information required under the earlier and the later acts in all of the years here involved were so inconsequential in comparison with the natural errors which normally crept into the returns due to defective bookkeeping methods and ignorance of the law, that the differences in information required as between one act and another was of no practical importance.[15] This is borne out by the fact that the Treasury Decisions, in requiring new returns in certain cases and in

[14]It seems to us absurd to suggest that any such impracticable distinctions have anything whatever to do with the running of the limitations period. No possible reason for such an impractical result suggests itself. But as a construction of T. D. 3310, the distinction is probably sound. T. D. 3310, as we contend, was intended only as a means of collecting promptly additional taxes imposed by the later act on account of changes effected by the later act; where such additional taxes would be shown to be due on taxpayer's own computations, such computations would be expected to be made on the assumption that the information disclosed in the earlier returns was correct. There was no expectation that the taxpayer would, in making the new return, reconsider the correctness of the facts previously reported.

[15]In the Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1919 (p. 18), it was said:

"The uncertainties inevitably incident to a new and elaborate system of taxation have resulted in many errors in the returns filed and also in many misconceptions regarding the respective rights of taxpayers and the Government. The intensive audit of every return of the many millions received became necessary as a pre-requisite to the correction of errors, both against the Government and against taxpayers.

"It has been a fundamental policy that the Government should with equal

not requiring new returns in others, did not base the requirement of the new return upon the basis of *different information* required under the two acts, but simply upon the basis of *additional taxes* being required by the later act.

4. Authorities.

There are three carefully considered, well-reasoned appellate court decisions in Petitioner's favor.[16] The Government has confessed error in another circuit.[17]

The only appellate court opinions against Petitioner's contentions are those of Judge Wilbur of the Ninth Circuit in the cases pending here as Nos. 35-39, relied upon by the Circuit Court of Appeals for the Fourth Circuit in deciding against Petitioner in this case.

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diligence refund amounts illegally collected and collect taxes illegally withheld."

In this connection, it is interesting to note that the original income and profits-tax return for this Petitioner for its 1918 fiscal year showed a tax liability of approximately $170,000.00 (R. 72). The additional tax shown on the amended return, due to changes by the 1918 Act, was approximately $50,000.00 (R. 72). However, as a result of the Bureau's audit and examination additional assessments were made in the sum of approximately $135,000.00 (R. 6, 7, 39, 40).

More illustrations, some even more striking, may be found from an analysis of the cases relied upon by the Government and collected in footnote 9 on pp. 10-11 of the Government Brief in Nos. 37, 38, 39. In the first of those cases decided in favor of the Government, *Davis Feed Co.*, 2 B. T. A. 616, involving a 1918 fiscal year, it appeared that the original return disclosed a tax liability of $12,902.03, the amended return showed an additional tax of $762.19 due to changes effected by the 1918 Act, and the Bureau's audit resulted in the determination of an additional tax of $3,541.13. In the other cases cited at the same place, the additional tax resulting from changes effected by the new revenue act did not exceed $200 or $300, although the deficiencies involved many thousands of dollars.

[16] See footnote 1, *supra*, p. 4.

[17] *Adams, Cushing & Foster, Inc.*, 19 B. T. A. 89, reversed on confession of error by Commissioner, 342 C. C. H. Par. 1443.184 (C. C. A. 1st, Sept. 10 1931). The Government also confessed error in the case of *Gus Holstine Dry Goods Co.*, 16 B. T. A. 1124, appealed to the Court of Appeals of the District of Columbia, 342 C. C. H. Par. 1443.184, (Sept. 10, 1931).

The Circuit Court of Appeals for the Ninth Circuit, after conceding that there is no statutory definition of "return", proceeds to argue that since the 1921 Act was not enacted until after the first return was filed that return could not comply with the requirement of a return under that Act or within the meaning of subsequent limitations provisions. The learned Circuit Judge does not, we believe, appreciate the significance of the wording of the Treasury Decisions in question. He certainly shows no appreciation of the true purpose of the Treasury Decisions or of the reasons why they require new returns only where additional taxes are due. He shows no understanding of the fact that there is no practical necessity for a new return as an aid to audit. He confuses a return substantially as complete as returns generally are with a so-called tentative return, merely because it is filed before the enactment of the new act, thereby wholly misinterpreting the holding of this Court in the *Florsheim Brothers* case, *supra*. He fails utterly to appreciate the importance of subsequent legislative affirmation of the executive promulgations, which indeed he does not mention. With regard to the very important practical considerations involved, he shows appreciation only of the difficulties that would be involved if it were held that the question as to which return starts the running of the statute of limitations period is made to depend upon the effect of the new act upon the particular taxpayer. He shows no appreciation whatever of the very unfortunate practical result of holding that where no second return was filed, the statute of limitations would never begin to run. And in the opinion Nos. 35-36 (69 F. (2d) 857, 862), the Circuit Court of Appeals seems to assume that a return which contains no computation of tax is for that reason not such a return as will start the running of the limitation period, which is directly contrary to the established rule. *Conrad Hardware Co.,* 8 B. T. A. 512, in which the Commissioner has acquiesced, VII-1 C. B. 7.

The discussions of the courts of original jurisdiction of the question here involved, relied upon by the Government and the Circuit Court of Appeals for the Ninth Circuit, are hardly worthy of consideration. The case of *Ralston-Purina Co.* v. *United States*, 58 F. (2d) 1062, contains no reasoning whatever and relies upon court decisions which are clearly distinguishable, some of which do not even relate to the same character of question. The opinion in that case does not even refer to the appellate court decisions in Petitioner's favor above referred to,[18] which had been decided many months before that case was decided. The case of *Globe-Excelsior Oak Tanning Co.* v. *United States*, 2 Fed. Supp. 470, also decided by the Court of Claims on the authority of the *Ralston-Purina Co.* case, *supra*, and the cases there relied upon, makes no reference whatever to the arguments here urged and apparently did not consider them, and was decided apparently without any appreciation of the fact that the cases here relied upon by Petitioner[19] were decided largely upon the basis of the interpretation and effect of Treasury Decision 2797 as applied to 1918 fiscal years. The court distinguishes those cases on the basis of undefined (and no doubt largely imaginary) differences between the 1918 and 1921 fiscal years, which the Government now concedes are not important in this connection. The opinion of the District Court in this case, also relied upon by the Circuit Court of Appeals of the Ninth Circuit, while much longer, is subject to much the same criticism as the *Globe-Excelsior Oak Tanning Co.* case, *supra*, and in addition contains so many inaccuracies in statements of law and fact that no profit can be derived from a discussion of it.[20]

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[18]See footnote 1, *supra*, p. 4.

[19]See footnote 1, *supra*, p. 4.

[20]For example, the learned District Judge says (R. 68):

"Whatever may be true in other respects, it has been firmly established by the Supreme Court that statutes limiting the time for action by the Government in collecting its taxes *are to be strictly construed in its favor. DuPont*

The *Updike* cases, referred to in footnote 3, page 6, *supra,* have no real relation to the present question, nor has the case of *Whitney-Bodden Shipping Co.* v. *United States,* 52 F. (2d) 1003, which holds simply that where a 1918 fiscal year return was filed before the passage of the 1918 Act, a second return was filed after its passage, the taxpayer, filing a second return and paying the additional tax there called for, did not pay for an additional assessment within the meaning of Section 1324 (a) of the 1921 Act relating to interest. The reasoning of the Court was that a tax "paid pursuant to an additional assessment", within the interest section, does not contemplate any voluntary payment on an original or amended return filed by the taxpayer. We agree with the Court's conclusion, but the case has nothing whatever to do with the present question.

The only other authorities to be considered are the decisions of the Board of Tax Appeals. The Board of Tax Appeals has always held that whenever additional taxes are due under the later act, even in cases like the case at bar and Nos. 35-39, where no additional information is required by reason of the later act, a second return is necessary to start the running of the statute of limitations.[21] On the other hand, the Board has held and now holds that the statute starts to run upon the filing of the first return

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Powder Co. v. *Davis,* 264 U. S. 456; *Bowers* v. *New York & Albany Lighterage Co.* 273 U. S. 346." (Italics ours.)

And in attempting to distinguish between the 1918 and 1917 Acts, the District Court says:

"a differentiation was made between invested capital and income" (*which* of course has been true since the beginning of time) "a provision was made for taxation of appreciation in property values" (which has never been true under any Federal tax law) . . . "a differentiation was made between earned and unearned income" (which differentiation was not made at that time) (R. 62).

It would needlessly consume the time of the Court further to discuss this opinion.

[21]See cases cited in Government Brief in Nos. 37-39, first paragraph, of footnote 9, p. 10.

where no additional tax is due under the latter act.[22] The principles upon which the Board bases its decisions are not readily discoverable, but an examination of the cases of *John Wanamaker, Philadelphia,* 8 B. T. A. 864, and *Myles Salt Co., Ltd.,* 18 B. T. A. 1742, including the dissenting opinion in latter case on the one hand, and the opinion in the case of *Fred T. Ley & Co.,* 9 B. T. A. 749 on the other, will disclose a shifting from one position to another as to whether the 1921 Act requires a new return in all cases under the later act and whether the Treasury Department, by Treasury Decision 3310, simply relieves taxpayers of the requirement where no additional tax is due, or whether the statute does not require a new return in any case and the Treasury Decision does require a new return in some such manner as will effect the force of the first return in beginning the running of the statute of limitations.

The cases cited in footnote 22, below are not earlier cases decided in confusion and not now representing the view of the Board, as is indicated by the Government in its brief in Nos. 37-39, footnote 9, p. 11. As a matter of fact, the first of these cases was decided by the Board after the Board had laid down, in the case of *John Wanamaker, Philadelphia,* 8 B. T. A. 864, the rule which has been consistently followed in cases where additional taxes are imposed by the later act. The Commissioner[23] now acquiesces in the decisions of the Board requiring no new return under the later act where no additional taxes are imposed thereby.

The first case decided by the Board on the question here involved was the case of *Davis Feed Co.,* 2 B. T. A. 616, which involved a 1918 fiscal year. It is significant that the Board did not have before it Treasury Decision 2797 and apparently had before it few, if any, of the many considerations here urged.

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[22] *Fred T. Ley & Co., Inc.,* 9 B. T. A. 749; *M. Brown & Co.,* 9 B. T. A. 753; *Keystone Coal & Mining Co.,* 10 B. T. A. 295; *Palmetto Coal Co.,* 11 B. T. A. 154; *Farmers Elevator Co.,* 13 B. T. A. 1079; Acq. VII-2 C. B. 13; *Denholm & McKay Co.,* 15 B. T. A. 225; Acq. VIII-1 C. B. 12.

[23] See footnote 22, *supra.*

CONCLUSION.

In the light of the foregoing reasons, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the case remanded to that court for further proceedings.

Respectfully submitted,

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APPENDIX A.

STATUTORY PROVISIONS AND TREASURY DECISIONS NOT QUOTED IN BRIEF.

Requirement of Filing Returns

Revenue Act of 1918 and 1921, Sec. 239:

"That every corporation subject to taxation under this title shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title."

Time of Filing Return

Revenue Act of 1918, Sec. 227 (a):

"That returns shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of March."

Revenue Act of 1921, Sec. 227 (a):

"That returns (except in the case of nonresident aliens) shall be made on or before the fifteenth day of the third month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the 15th day of March."

Definition of Taxable Year

Revenue Act of 1918, Sec. 200:

". . . The first taxable year, to be called the taxable year 1918, shall be the calendar year 1918 or any fiscal year ending during the calendar year 1918."

Revenue Act of 1921, Sec. 200:

". . . The first taxable year, to be called the taxable year 1921, shall be the calendar year 1921 or any fiscal year ending during the calendar year 1921."

Fiscal Years

Revenue Act of 1918, Sec. 205 (a):

"That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period

falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period."

"Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917, and by Title I of the Revenue Act of 1917, shall be credited towards the payment of the tax imposed for such fiscal year by this act, and if the amount so paid exceeds the amount of such tax imposed by this act, or . . . the excess shall be credited or refunded in accordance with the provisions of section 252."

Revenue Act of 1921, Sec. 205 (a):

"That if a taxpayer makes return for a fiscal year beginning in 1920 and ending in 1921, his tax under this title for the taxable year 1921 shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1918 at the rates for the calendar year 1920 which the portion of such period falling within the calendar year 1920 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1921, which the portion of such period falling within the calendar year 1921 is of the entire period,

"Any amount paid before or after the passage of this Act on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1918 shall be credited toward the payment of the tax imposed for such fiscal year by this Act, and if the amount so paid exceeds the amount of such tax imposed by this Act, the excess shall be credited or refunded in accordance with the provisions of section 252."

Treasury Decision 2797

Approved March 11, 1918 (Quoted in Brief, p. 11, *supra*)

Treasury Decision 3310

T. D. 3305, approved March 16, 1922, is amended to read as follows:

"If any taxpayer has, before November 23, 1921, filed a return for a fiscal year ending in 1921, and paid or become liable for a tax computed under the Revenue Act of 1918, and is subject to additional tax for the same period under the Revenue Act of 1921, a return covering such additional tax shall be filed at the same time as the returns of persons making returns for the fiscal year ending February 28, 1922, are due under the laws and regula-

tions, and payment of such additional tax will be due in the same installments and at the same times as in the case of payments based on returns for the fiscal year ending February 28, 1922. Attention is directed to the provisions of sections 214 (a)9 and 234 (a)8 of the Revenue Act of 1921.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved March 28, 1922.
A. W. MELLON,
Secretary of the Treasury.

Treasury Decision 3843

"Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926.

D. H. BLAIR,
Commissioner.

Approved April 1, 1926,
GARBRART B. WINSTON,
Acting Secretary of the Treasury."

Treasury Decision 3220.

To Collectors of Internal Revenue and others concerned:

An examination of income and excess profits tax returns for 1917 and subsequent years has disclosed that many taxpayers have used appreciated and inflated values in determining invested capital shown in such returns contrary to section 207 of the Revenue Act of 1917 and section 326 of the Revenue Act of 1918.

This office has held consistently that the use of appreciated or inflated values in determining invested capital is not permissible and this ruling has been sustained by the United States Supreme Court in the case of the *La Belle Iron Works* v. *The United States* (41 Sup. Ct. 528; T. D. 3051).

All taxpayers who, in the preparation of their income and excess profits tax returns for 1917 and subsequent years, have used appreciated or inflated values in determining the amount of their invested capital are required to file with the collector of internal revenue within 90 days from date of this decision amended returns for each of such years, in which the invested capital shall be computed strictly in accordance with the law and regulations and without the use of appreciated or inflated values. It is not required

that such amended returns shall include the figures shown in the original returns which are unaffected by this decision. Only such figures as are necessary to show the correct value used in the computation of invested capital and such totals as are necessary to a redetermination of the tax need be shown. Payment of the additional tax shown to be due on such amended returns must also be made at the time the returns are filed.

Failure to file amended returns within the time specified will subject taxpayers to the penalties provided for in section 3176, United States Revised Statutes, as amended.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved: August 26, 1921.

A. W. MELLON,
Secretary of the Treasury.

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 146

CLIFTON MANUFACTURING COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

On May 28, 1918, the petitioner filed a tax return for the fiscal year ending March 31, 1918. (R. 62.) Thereafter the Revenue Act of 1918 was passed and made applicable to the taxable year 1918. Following the enactment of this statute, an additional return for the same period was filed on April 29, 1919, under the 1918 Act.

On June 25, 1923, the petitioner executed the first of a series of waivers of the limitation on assessment and collection.[1] An assessment made by

[1] Since the applicable period of limitations was five years, this waiver was executed before the period had run, if computed from the date of filing of the later return, but not if computed from the date of filing of the earlier return.

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the Commissioner in September, 1926, and collections in September and October, 1926, form the basis for the present controversy. The petitioner admits they were valid if the waivers were valid, but insists that the waivers were invalid since they were obtained under a "mutual mistake of the parties and misrepresentation by the Government agents to the effect that the limitation period, * * * had not expired when each of the purported waivers was requested." (Pet. 3.)

Petitioner brought suit against the United States to recover the amounts in question, praying for equitable relief against the defense of the waivers if they should be held valid at law. The District Court decided against petitioner on two independent grounds: (1) That the period of limitations began to run from the filing of the second return so that there could not have been any misrepresentation or mutual mistake; (2) that even if the period of limitations began to run from the filing of the earlier return, the waivers were nevertheless valid. (R. 71–80.) Upon appeal, the Circuit Court of Appeals affirmed the judgment of the District Court in a *per curiam* opinion which passed upon only the first point. (R. 148.)

The first point is so closely related to the questions involved in *National Paper Products Co.* v. *Helvering,* Nos. 35, 39, October Term, 1934, and *Zellerbach Paper Co.* v. *Helvering,* Nos. 36–38, October Term, 1934, in which certiorari was

granted June 4, 1934, that we do not oppose the present petition. However, we respectfully recommend that this Court defer action on this petition until after it has decided the above cases. If those cases are decided in favor of the Government, the petition should be denied. If they are decided against the Government, we do not oppose the granting of certiorari, but respectfully suggest that the case then be remanded to the Circuit Court of Appeals so that it may pass upon the second point.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.

JULY 1934.

U. S. GOVERNMENT PRINTING OFFICE: 1934

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 146

CLIFTON MANUFACTURING COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of South Carolina (R. 50–69) is reported in 3 F. Supp. 508. The opinion of the Circuit Court of Appeals (R. 120–122) is reported in 70 F. (2d) 102.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 4, 1934 (R. 122). A petition for a writ of certiorari was filed July 3, 1934, and the writ was granted October 8, 1934. The juris-

diction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a tax return filed under the Revenue Act of 1917 prior to the enactment of the Revenue Act of 1918 started the running of the period of limitations prescribed by the Revenue Act of 1918.

2. Whether the collection of the tax was authorized by timely and valid waivers.

STATUTES AND OTHER AUTHORITIES INVOLVED

These are set forth in Appendix A, *infra*, pp. 26–31.

STATEMENT

This suit was instituted in the District Court of the United States for the Western District of South Carolina to recover income and profits taxes for the fiscal year ending March 31, 1918, in the sum of $162,805.61 and interest (R. 50). At the trial it was conceded that there was a good defense as to part of the claim by reason of the filing of a claim in abatement and the application of Section 611 of the Revenue Act of 1928 (R. 53). As a result petitioner's claim was reduced to $57,265.76 with interest (R. 50).

The case was tried before the court without the intervention of a jury (R. 71), and the District Court filed an opinion containing findings of fact and conclusions of law (R. 50–69). From these findings the following pertinent facts appear:

Petitioner is a corporation. For the fiscal year April 1, 1917, to March 31, 1918, it filed a return on May 28, 1918, under the Revenue Act of 1917, disclosing a tax liability of $171,002.96. After the passage of the Revenue Act of 1918, and on April 29, 1919, petitioner filed another return for the same period disclosing a tax liability of $50,638.75 in excess of that shown on the first return. These taxes were paid and in June 1919 an additional assessment was made for the said fiscal year which was paid on June 16, 1919. An additional assessment was made in May 1921, which was paid. On May 26, 1926, a letter setting forth a deficiency of $37,313.46 was mailed to petitioner. No appeal was taken to the Board of Tax Appeals and the tax was assessed, with interest, on September 4, 1926, and paid on October 15, 1926 (R. 52).

On June 25, 1923, a waiver was executed by petitioner's president and treasurer extending the time for the assessment and collection of 1918 taxes for one year (R. 54–55). Thereafter other waivers were executed, on January 19, 1924 (R. 26), December 4, 1924 (R. 28–29), and November 18, 1925 (R. 30, 73). The District Court found as a fact that there was no such misrepresentation, mutual mistake, or lack of authority as to invalidate the waivers, even if signed after the expiration of the statutory period (R. 55).

The judgment of the District Court for the United States was affirmed by the Circuit Court

of Appeals upon the ground that the period of limitations began to run from the filing of the second return (R. 120–122).

SUMMARY OF ARGUMENT

1. The return of May 28, 1918, was required by the Revenue Act of 1917 and it was filed in response thereto. The Revenue Act of 1918 required every corporation to file a return and that requirement was not satisfied by the return already filed. Not until the return of April 29, 1919, was filed did petitioner attempt to comply with the statutory requirement. Since Congress adopted the date when the return was filed as the beginning of the statutory period of limitations, we submit that the time did not begin to run in this case until April 29, 1919. In the Revenue Act of 1918 there were many changes of a basic and fundamental character, in addition to an increase in the rates. These changes would normally require a new return and it would be only a fortuitous circumstance if the return filed under the Revenue Act of 1917 should prove to have reported the same tax liability that was later incurred under the Revenue Act of 1918. The Treasury Decision requiring additional returns where the taxpayer was subject to an additional tax must be read in the light of the authority of the administrative officers who issued it. They have no power to waive substantial rights of the United States. Moreover, the Treasury Decision makes no repre-

sentation with respect to the period of limitations and it should not be construed to reduce the time which Congress intended the Commissioner to have for auditing the returns and assessing and collecting the tax. The construction which has been put upon the Treasury Decision by some courts is unsound and achieves a result which is contrary to the express terms of the statute. Furthermore, the new statute had a substantial effect upon the petitioner's tax liability. Petitioner filed a return in response to the requirements of the Revenue Act of 1918 and hence we submit that the return of April 29, 1919, marked the time when the limitation period commenced to run.

2. The decision below may be sustained upon the independent ground that petitioner executed a series of waivers which prevented the running of the limitations period. It is now well settled that waivers are valid even though executed after the expiration of the statutory period. The District Court found as a fact that there was no such misrepresentation, mutual mistake, or lack of authority in connection with the execution of the waivers as to invalidate them. The case presents no unusual circumstances; no element of coercion or duress is involved; and we submit that the waivers constitute a valid defense to this action.

ARGUMENT

I

THE STATUTE OF LIMITATIONS COMMENCED TO RUN ON APRIL 29, 1919, WHEN A RETURN WAS FILED IN RESPONSE TO THE REQUIREMENTS OF THE REVENUE ACT OF 1918

This is a suit against the United States in which a tax is sought to be recovered upon the ground that the collection was not timely. The petition for certiorari presents the single question whether the statute of limitations upon the assessment and collection of additional income and excess profits taxes for the fiscal year ending March 31, 1918, began to run on May 28, 1918, or upon April 29, 1919, the dates upon which petitioner filed two separate returns.

The Revenue Act of 1918 did not become a law until February 24, 1919. Consequently, the return of May 28, 1918 (R. 85), was filed while the Revenue Act of 1917 was in effect. That return was required by the 1917 Act and was filed in response to it. The Revenue Act of 1918 provided that fiscal years ending in the calendar year 1918 should be taxed partly at the rates imposed by the Revenue Act of 1917 and partly at the rates imposed by the Revenue Act of 1918. Sections 205 (a) and 335 (a), *infra,* pp. 26, 27. These sections deal with the taxes "imposed for such fiscal year by this title", and hence it is clear that the Revenue Act of 1918 is to be regarded as the statute which imposed the tax in this case.

In clear and simple language which needs no construction the Revenue Act of 1918 required that returns be filed covering such fiscal years.

Section 239, dealing with the income tax, provided:

> That every corporation subject to taxation under this title and every personal service corporation shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this title. * * *

Section 336, dealing with the excess profits tax, provided:

> That every corporation, not exempt under section 304, shall make a return for the purposes of this title.

Section 250 (b) required that—

> As soon as practicable after the return is filed, the Commissioner shall examine it.

Section 250 (d)[1] provided that—

> * * * the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made * * *.

---

[1] The statute of limitations applicable to this case had its origin in this section. In all the later Acts the date when the return was filed has continued to be the starting point of the statutory period.

Section 250 (d), Revenue Act of 1921, c. 136, 42 Stat. 227; Section 277 (a) (2), Revenue Act of 1924, c. 234, 43 Stat. 253 (U. S. C., Title 26, Sec. 1057); Section 277 (a) (3), Revenue Act of 1926, c. 27, 44 Stat. 9 (U. S. C. App., Title 26, Sec. 1057).

Pursuant to these requirements petitioner filed another return, on April 29, 1919, for its fiscal year ending March 31, 1918 (R. 52, 72, 85–89). This return disclosed that the tax as computed under the Revenue Act of 1918 was $50,638.75 in excess of the tax as computed under the Revenue Act of 1917 (R. 88). If this was the return from which the statute of limitations prescribed by Section 250 (d) began to run, it is conceded that the collection was timely.

The express terms of the Revenue Act of 1918 clearly required petitioner to file this second return. But had the statute been less explicit, there are cogent reasons which would irresistibly lead to the conclusion that Congress must have intended that a return be filed, even by those corporations which had already filed a return under the Revenue Act of 1917. A comparison of the two statutes shows conclusively that many changes were made in the new Act which would make inadequate many returns filed under the Revenue Act of 1917.

Not only were the rates increased (compare Sec. 1206, Revenue Act of 1917, c. 63, 40 Stat. 300, with Sec. 230 (a), Revenue Act of 1918; Sec. 201, Revenue Act of 1917, with Sec. 301, Revenue Act of 1918), but many changes were made of a basic and fundamental character upon which the computation of the tax depended (see H. Rept. No. 767, 65th Cong., 2nd Sess.; S. Rep. No. 617, 65th Cong., 3rd Sess.). Section 212, Revenue Act of 1918, for the first time required that income tax returns be made

upon the basis of the taxpayer's fiscal year (*National Shirt Shops* v. *United States*, 57 F. (2d) 925, 928 (C. Cls.), certiorari denied, 287 U. S. 633. Accordingly, any taxpayer who kept his books on a fiscal-year basis but had made a return under the Revenue Act of 1917 upon a calendar-year basis was required to file a return which corresponded with his books.

Section 212 (b), Revenue Act of 1918, required that the net income be computed "in accordance with the method of accounting regularly employed in keeping the books of such taxpayer." This was a departure from previous practice, for under earlier Acts the taxpayer might keep its books upon the accrual basis and file its tax return upon the cash basis. See Section 8 (g), Revenue Act of 1916, c. 463, 39 Stat. 756; *Appeal of Charles A. Collin*, 1 B. T. A. 305, 311.

Section 240 of the Revenue Act of 1918 required that corporations which were affiliated should file consolidated returns. The Revenue Act of 1917 required affiliated corporations to make separate income tax returns. (See Articles 203 and 207, Regulations 33, Revised.) The Regulations dealing with the excess-profits tax under the Revenue Act of 1917 permitted affiliated corporations to file consolidated returns with respect thereto. Articles 77–78, Regulations 41. See S. Rep. No. 275, 67th Cong., 1st Sess., p. 34.

These changes were applicable alike to all corporate taxpayers, and since Congress provided that

every corporation subject to taxation under the new Act should make a return, there seems to be little room for the contention that only those corporations whose tax was increased by reason of the change were required to make returns. It is immaterial whether the Commissioner might have secured all needed information from the return which had already been filed, for, in any event, the Commissioner could not be assured of that until the taxpayer applied the new provisions of the statute to itself and reported that they made no change in its situation. Under the statute the Commissioner is entitled to the information from the taxpayer before the statute of limitations begins to run and all taxpayers were under the duty to file a return under the 1918 Act, wholly aside from the possibility that the Commissioner could secure sufficient information elsewhere. In *Florsheim Bros. Co.* v. *United States*, 280 U. S. 453, this Court answered the argument that a tentatitve return was sufficient to start the limitation period running in this language (pp. 463–464):

> The Commissioner is not confined to the taxpayer's return for the basis of his assessment. He may secure additional information; and he may assess the tax even if the taxpayer files no return. Rev. Stat., Sec. 3176, U. S. C., Tit. 26, Sec. 97; Revenue Act 1918, Sec. 250 (c). The mere fact that, in the absence of any information, the Commissioner might be compelled to assess the tax on the basis of the taxpayer's estimate, does

> not transform that simple estimate of the amount of the tax into the detailed return of the items of gross income, deductions, and credits required by the Act.

However, by Treasury Decision 2797, *infra*, p. 30, it was announced that if a corporation is subject to additional tax under the Revenue Act of 1918 a return must be filed. This decision, and similar ones under other Acts, have been construed either as relieving from the requirement those corporations whose tax was not increased, or as regarding the new return, in those cases where it was filed, as simply amendatory of the return previously filed. *Myles Salt Co.* v. *Commissioner,* 49 F. (2d) 232 (C. C. A. 5th); *Isaac Goldmann Co.* v. *Burnet,* 51 F. (2d) 427 (App. D. C.); *Valentine-Clark Co.* v. *Commissioner,* 52 F. (2d) 346 (C. C. A. 8th).

The consequence of such a construction requires its rejection. The result would be that notwithstanding Congress required every corporation to submit a return and prescribed a five-year limitation period to commence at the time the return was filed, nevertheless the five-year period was shortened by nine months because petitioner had filed a return under the Revenue Act of 1917 before the passage of the Revenue Act of 1918.

We submit that the Treasury Decision must be read in the light of the power of the administrative officers who issued it. No officer of the United States has authority to substitute something else for the thing specified by the provisions of an Act

of Congress (*Lucas* v. *Pilliod Lumber Co.,* 281 U. S. 245, 249); nor to waive substantial rights of of the United States (*Finn* v. *United States,* 123 U. S. 227). Such waivers, if permitted, would defeat the only purpose of the statute and impose a liability upon the United States which otherwise would not exist. *Tucker* v. *Alexander,* 275 U. S. 228. In *Davis* v. *United States,* 17 C. Cls. 292, where a claim for allowance of a drawback for internal taxes paid on exports was under consideration, it was said (p. 301):

> When a government declares by law that certain specified acts must be done, in order to a citizen's becoming entitled to a gratuity out of the public Treasury, to which, aside from that law, he would have no right, every one of the acts must be done before he can claim the gratuity.
>
> And when a time is limited within which any of the acts shall be done, the very fact that it is limited is a declaration by the government of its materiality, and constitutes a condition precedent, which must be fulfilled before the right to the gratuity can be fixed. No claimant can say that it does not matter whether he did the act within the required time; for he has no standing as a claimant before the Commissioner unless it was done within that time; nor can any officer of the government, or any court, dispense with the requirement of time, unless express law so authorize; * * *.

Reading the Treasury Decision in the light of these principles, we submit that at most it authorized corporations to determine at their peril whether or not they were subject to additional taxes and to omit filing a new return only where it would be an idle formality. It certainly did not represent that the date of filing the 1917 return would be treated as the beginning of the limitation period. Cf. *Florsheim* case, *supra*, p. 464, where there was a similar holding with respect to the Treasury's permission to file tentative returns. To attribute any broader effect to the Treasury Decision—to hold it recognized a return already filed as satisfying the provisions of the new statute—would, we submit, require the conclusion that the administrative officers had exceeded their authority and had announced a rule in conflict with the express terms of the statute.

Zellerbach Paper Co. v. *Helvering*, 69 F. (2d) 852 (C. C. A. 9th), dealt with a similar situation. That court declined to follow the *Myles Salt*, *Goldmann*, and *Valentine-Clark* cases, *supra*, and said (p. 857) :

> We think the really serious question involved in the matter of returns under the new act for the taxable year 1921 is not whether the Commissioner had a right to require a new return under the Revenue Act of 1921, the act itself required it, or whether he intended to do so, as he clearly did in the case at bar, but whether he had a right to

> excuse taxpayers from making a return under that law as he attempted to do where the statute expressly required such a return, that is, where there was no increase of tax. That question, however, is not involved here and we need not consider it.

See also *National Paper Products Co.* v. *Helvering,* 69 F. (2d) 857 (C. C. A. 9th).[2]

The only effect of the new statute upon the taxpayers involved in the *Myles Salt, Goldmann,* and *Valentine-Clark* cases, *supra,* was a reduction in the amount of the statutory credit resulting in increased taxes of small amounts. Those decisions were influenced by the fact that the effect of the new statute upon the particular taxpayers before the court was negligible. We submit that such a theory is unsound. No support for it can be found in the statute and there is no reasoning or logic to commend it. If the rule is that every corporation is required to file a return, there are no difficulties. If the rule is to be that every corporation which is liable for an additional tax is required to file a return, there should be no distinction between large amounts of tax and smaller amounts. But even upon that basis such a rule is objectionable. The decision in the *Goldmann* case, *supra,* pp. 427–428, recognizes that the result may be different "in

[2] The *Zellerbach* and *National Paper Products* cases, *supra,* are now pending in this Court upon writs of certiorari (Nos. 35–39, present term) and are to be heard at the same time as the instant case.

those cases which, under the 1921 act, new and different taxes are assessed or a new basis of taxation provided, as is the case in some few instances not here involved." A small additional tax was due under the new Act in that case and the court evidently meant that a larger tax liability would present a different situation. In other words, that court would say that the accuracy with which the taxpayer applies the new statute is determinative of the question whether a new return is required. In those cases where the taxpayers correctly decide that the new statute creates only a nominal liability, no returns are required; in those cases where the taxpayers' decisions turn out to be erroneous because the new statute requires larger taxes, they have failed to comply with the statute. We submit that such a rule is unsound.

The statute applies alike to all corporations and requires them all to file returns. This requirement is not contingent upon their being liable for a tax. Under all the Revenue Acts corporations are required to file returns whether or not they have to pay a tax. The returns are required to include a computation of the tax and in the case of the first installment provided for in Section 250 (a) of the Revenue Act of 1918 the instructions printed on the return operate as a demand and a notice of the amount which is due. See Section 250 (e), Revenue Act of 1918. The return which was filed May 28, 1918, in advance of the enactment of the

Revenue Act of 1918, did not purport to satisfy these requirements of the 1918 Act. It was filed under the Revenue Act of 1917 and in compliance with its provisions. No statute of limitations was then applicable and we submit that a return filed in response to the requirements of the Revenue Act of 1917 could not start the statute of limitations prescribed by Section 250 of the Revenue Act of 1918.

However, even if the rule announced in the *Goldmann* case be correct, and only those taxpayers who are required to pay a substantial additional tax were required to file returns under the Revenue Act of 1918, it is apparent that this rule does not strengthen petitioners' position, because the effect of the new statute in the case at bar was to require an additional tax of $50,638.75. Petitioner actually filed a return after the enactment of the Revenue Act of 1918, showing this additional tax to be due, and we submit that this return, filed on April 29, 1919, marked the beginning of the statutory period for collection.

Section 250 (d) of the Revenue Act of 1918 limited the time for collection to five years after the return was due or was made. Unless the return filed April 29, 1919, marked the beginning of this period, it is quite evident that part of the five years had already elapsed when the statute was written and that the period which Congress concluded to allow the Commissioner for examination of the re-

turns and the computation, assessment, and collection of the tax commenced to run before the Commissioner was in a position to know what the statute required or the taxpayer had disclosed how the new requirements affected it. This result is not required by the statute and the rule of construction that doubtful taxing statutes are to be construed favorably for the taxpayer is not a reason for creating the doubt or exaggerating it. *Irwin* v. *Gavit,* 268 U. S. 161. Ordinarily, statutes of limitations are not construed to commence to run against a right until the right is capable of enforcement. *Borer* v. *Chapman,* 119 U. S. 587, 602. This tax could not have been collected before the enactment of the Revenue Act of 1918, and we submit that the statute of limitations did not start in advance of its enactment.

The fact that the Revenue Act of 1918 was in terms retroactive to January 1, 1918, does not compel the conclusion that any return filed subsequent to that date was intended to be recognized as a return which would satisfy the requirements of the statute. All taxpayers were under obligation to file returns during the year 1918, accounting for their 1917 income. The return which petitioner filed on May 28, 1918, was no different in this respect from the return of any other taxpayer. All purported to be filed in compliance with the requirements of the Revenue Act of 1917, and only under fortuitous circumstances would they report

the same tax liability as was later incurred under the Revenue Act of 1918. The purpose to be served by making the statute retroactive was to apply the new rates to income earned during the whole calendar year 1918. There is no evidence of an additional purpose to require the assessment and collection of taxes due under the Revenue Act of 1918 within a shorter period than five years in the case of taxpayers reporting on a fiscal-year basis.

We submit that the return of May 28, 1918, was not a return under the Revenue Act of 1918 because it was not intended to be such a return and was not offered as such. The term " return " comprehends a formal response to a statutory requirement. In deciding that a tentative return filed under the Revenue Act of 1918 did not start the running of the statute of limitations period, this Court declared in the *Florsheim* case, *supra,* p. 462, that—

> The word " return " is not a technical word of art. It may be true that the filing of a return which is defective or incomplete under Section 239 is sufficient to start the running of the period of limitation; and that the filing of an amended return does not toll the period. But the defective or incomplete return purports to be a specific statement of the items of income, deductions and credits in compliance with Section 239. And, to have that effect, it must honestly and reasonably be intended as such.

So strict is the rule that a statute of limitations runs against the United States only when it as-

sents, and upon the terms it prescribes, and that meticulous compliance with all named conditions is necessary to secure the benefit of such a limitation, that this Court held in the *Pilliod Lumber* case, *supra,* that the mere omission of the oath of the prescribed corporate officers prevented the running of the statutory period of limitations. In that case a tentative return was filed which was sworn to by the president and treasurer of the corporation. The oaths, however, were omitted from the form upon which the completed return was filed and although an attempt was made to cure the defect later by a separate sworn statement, this Court held that the collection of a deficiency six years after the filing of the completed return was not barred. In that case there was no failure upon the part of the taxpayer to supply all the required information and there was no failure to file a form which purported to be a return in response to the requirements of the taxing statute. The only omission was the oath.

Unlike that case, there was here no attempt to satisfy the requirements of the Revenue Act of 1918 by the return filed on May 28, 1918. That return did not purport to be a compliance with the Revenue Act of 1918 and it did not disclose how the Revenue Act of 1918 affected the petitioner's tax liability. It was not until the return of April 29. 1919, was filed that petitioner made any attempt to satisfy the requirements of the Revenue Act of 1918; it was not until that return was filed that the petitioner discharged its duty and complied with

the named conditions upon which the running of the statute of limitations depends. Hence, we submit that the statute of limitations did not begin to run earlier than April 29, 1919, and that the collection of the tax was not barred.

This Court is not called upon to go so far in affirming the decision below as it did in the *Pilliod* case, and there is greater justification here. In the *Pilliod* case the sole practical effect of the omission of the oath was to prevent the prosecution of the officers for offenses growing out of false statements. The effect here of holding that the statute of limitations commenced to run before the Revenue Act of 1918 was enacted will be to reduce the time available to the Commissioner for assessing and collecting the tax from five years (which the statute provides) to four years and three months.

Additional authorities pertinent to this question are cited in the brief for the respondent in *Zellerbach Paper Co.* v. *Helvering* and *National Paper Products Co.* v. *Helvering,* Nos. 37, 38, 39, present term, and we request that they be considered as incorporated herein by reference.

II

THE COLLECTION OF THE TAX WAS AUTHORIZED BY TIMELY AND VALID WAIVERS

The decision below may be supported upon the independent ground that on June 25, 1923, petitioner executed the first of a series of waivers which prevented the running of the statute of limi-

tations. If, as hereinbefore contended, the five-year period of limitations commenced to run from the filing of the return of April 29, 1919, the initial waiver of June 25, 1923, was given well within the period and there is a complete chain of waivers covering the date of collection. However, if the limitation period commenced to run upon the filing of the return of May 28, 1918, the initial waiver was given more than five years thereafter.

Petitioner's contention that the waivers are invalid by reason of fraudulent misrepresentation, mutual mistake, or lack of authority of petitioner's president and treasurer to execute it, is entirely predicated upon the claim that the statutory period of limitations had expired (R. 66).

Assuming petitioner's premise to be correct, it is now settled that waivers given after the expiration of the period of limitations are valid. *Stange* v. *United States,* 282 U. S. 270; *Burnet* v. *Railway Equipment Co.,* 282 U. S. 295; *Brown & Sons Co.* v. *Burnet,* 282 U. S. 283; *McDonnell* v. *United States,* 288 U. S. 420; *Helvering* v. *Newport Co.,* 291 U. S. 485. Therefore the waivers were timely.

Accordingly the only remaining inquiry is whether there was any fraudulent misrepresentation, mutual mistake, or lack of authority in petitioner's officers in executing the waivers which would invalidate them. The District Court found that there was none (R. 55), and we submit that that finding is supported by the evidence. The claimed misrepresentation consists of a letter dated June

21, 1923 (R. 53), in which the Commissioner requested petitioner to execute a waiver "in order that the interests of the Government may not be jeopardized." Relying upon its contention that the statute of limitations had then expired, petitioner claims that this letter was a fraudulent misrepresentation that the limitation period had not expired. Similar contentions are made in connection with the letters requesting the subsequent waivers (R. 25–6, 27). In *Fleitmann* v. *Burnet,* 65 F. (2d) 178 (App. D. C.), certiorari denied, 290 U. S. 638, and *Helvering* v. *South Penn Oil Co.,* 68 F. (2d) 420 (App. D. C.), similar contentions were rejected. The same situation existed in the *Railway Equipment* case, *supra.* See note 11, p. 303.

Petitioner's contention that the waivers are invalid by reason of mutual mistake and lack of authority in petitioner's officers is likewise predicated upon the premise that the statute of limitations had expired at the time the initial waiver was executed. A similar defense was rejected in *Piedmont Wagon & Mfg. Co.* v. *United States,* 6 F. Supp. 125 (C. Cls.), where the court said (p. 129):

> The waivers in question were sent to plaintiff by the Commissioner in the usual way with request that they be executed and returned. This was done without protest of any kind.

There were no unusual circumstances existing in the case at bar. Assuming that the statute of limitations had then expired, petitioner's president did

not know it and the Government representatives who negotiated for the waivers were then under the impression that the time had not expired (R. 66–67). The situation presented is no different from many other cases, and as pointed out by this Court in the *Stange* case, *supra,* p. 277, the action of the parties "is explained by the belief prevailing prior to the decision in *Bowers* v. *N. Y. & Albany Lighterage Company,* 273 U. S. 346, that distraint, the common method for coercing payment, was possible even when the statutory period for collection by suit had expired." Any mistake existing in this case was one of law, not induced by misrepresentation, coercion, or duress of any kind, and we submit that there is no element here involved which should distinguish this case from the *Stange, Railway Equipment Co., McDonnell, Brown & Sons Co.,* and *Newport Co.* cases, *supra.*

In the *Railway Equipment* case, *supra,* this Court said (p. 303):

> The taxpayer contends that the waiver was inoperative because secured by duress. The argument is that while the Commissioner in December 1925, might have made a jeopardy assessment and have enforced collection, such action would have been illegal because the statutory period had then expired, and that a waiver procured by such a threat is ineffective. Whether or not the Commissioner would have been liable to the taxpayer for a collection made as the result of a jeopardy assessment in 1925, we need not deter-

> mine. He clearly had the power to make such assessment and thereby compel the filing of a claim for abatement and the giving of a bond, or, if such claim and accompanying bond were not filed, to make collection and relegate respondent to an action at law. In the absence of a determination that this deficiency was barred, it was the Commissioner's duty to proceed to insure the assessment and collection of the tax. At his suggestion, the taxpayer executed the waiver. Thereby it was enabled to have all questions concerning the alleged deficiency considered by the Board. A waiver given under such circumstances is not invalid. This contention, which seems to have been raised for the first time in this Court, is also unsound.

Accordingly we submit that petitioner's officers were not merely waiving petitioner's rights; they were also securing the benefit of postponing the action of the Collector. In this view of the case we submit that petitioner's objections to the waivers are insufficient.

The decision in *Panther Rubber Mfg. Co.* v. *Commissioner,* 45 F. (2d) 314 (C. C. A. 1st), upon which petitioner strongly relies, was rendered before the decision in the *Stange case, supra,* and the court was plainly influenced by its view that the waivers were not timely. Where the court understood that so far as timeliness was concerned the waivers were valid, we find no decision which holds that such negotiations as existed here invalidate the waivers.

Cf. *United States* v. *Southern Lumber Co.*, 51 F. (2d) 956 (C. C. A. 8th), certiorari denied, 284 U. S. 680. The distinction which was made in *Hammond* v. *Carthage Sulphite Pulp & Paper Co.*, 34 F. (2d) 155 (N. D. N. Y.), and *South Penn Oil Co.* v. *Commissioner*, 20 B. T. A. 1180, between extending an open limitation period and extending a period which had expired, does not exist.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed.

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OCTOBER 1934.

APPENDIX

STATUTES AND OTHER AUTHORITIES INVOLVED

Revenue Act of 1918, c. 18, 40 Stat. 1057:

> SEC. 205. (a) That if a taxpayer makes return for a fiscal year beginning in 1917 and ending in 1918, his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period: *Provided*, That in the case of a personal service corporation the amount to be paid shall be only that specified in clause (1).
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> * * * * *
>
> SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or

fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

(e) If any tax remains unpaid after the date when it is due, and for ten days after notice and demand by the collector, then, except in the case of estates of insane, deceased, or insolvent persons, there shall be added as part of the tax the sum of 5 per centum on the amount due but unpaid, plus interest at the rate of 1 per centum per month upon such amount from the time it became due: *Provided*, That as to any such amount which is the subject of a bona fide claim for abatement such sum of 5 per centum shall not be added and the interest from the time the amount was due until the claim is decided shall be at the rate of ½ of 1 per centum per month.

In the case of the first installment provided for in subdivision (a) the instructions printed on the return shall be deemed sufficient notice of the date when the tax is due and sufficient demand, and the taxpayer's computation of the tax on the return shall be deemed sufficient notice of the amount due.

* * * * *

SEC. 335. (a) That if a corporation (other than a personal service corporation) makes return for a fiscal year beginning in 1917 and ending in 1918, the tax for the first taxable year under this title shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title II of the Revenue Act of 1917 which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates

specified in subdivision (a) of section 301 which the portion of such period falling within the calendar year 1918 is of the entire period. Any amount heretofore or hereafter paid on account of the tax imposed for such fiscal year by Title II of the Revenue Act of 1917 shall be credited toward the payment of the tax imposed for such fiscal year by this title, and if the amount so paid exceeds the amount of the tax imposed by this title, the excess shall be credited or refunded to the corporation in accordance with the provisions of section 252.

* * * * *

SEC. 336. That every corporation, not exempt under section 304, shall make a return for the purposes of this title. Such returns shall be made, and the taxes imposed by this title shall be paid, at the same times and places, in the same manner, and subject to the same conditions, as is provided in the case of returns and payment of income tax by corporations for the purposes of Title II, and all the provisions of that title not inapplicable, including penalties, are hereby made applicable to the taxes imposed by this title.

Treasury Regulations 33 (revised), governing the collection of the income tax imposed by the Act of September 8, 1916, as amended by the Act of October 3, 1917:

ART. 203. *When required.*—Every corporation not specifically enumerated as exempt shall make a return of annual net income whether or not it may have for the particular year any net income, or whether or not it shall be a subsidiary of or controlled by another corporation, and such return, if made on the basis of a calendar year, must

be filed with the collector on or before March 1, next following the year for which the return is made; if on the basis of a fiscal year ending with a date other than December 31, it must be filed within 60 days after the close of such fiscal year.

* * * * *

ART. 207. *Branch corporations.*—For the purpose of the tax and for the purpose of a return, every corporation is held to be and is a separate and distinct entity. The fact that a branch corporation is organized in any State to meet peculiar conditions there existing and which make it impracticable for the parent company as such to do business in such State, although such subsidiary may be to all intents and purposes a mere branch of the parent company, does not relieve it from the necessity of making a return for each year.

If such branch corporation actually transacts business from which income arises, accrues, and is received by it, it will be incumbent upon such corporation to make a detailed return, as if it were in no way related to any other corporation, setting forth in such return the full amount of income which it receives or which accrues to it, together with the authorized deductions therefrom, and upon any net income thus disclosed the tax will be assessed and required to be paid.

Treasury Regulations 41, relative to the war excess profits tax imposed by the War Revenue Act, approved October 3, 1917:

ART. 77. *When affiliated corporations must furnish information as to intercorporate relations.*—For the purpose of the excess profits tax every corporation will describe in its return all its intercorporate relationships

with other corporations with which it is affiliated, and will furnish such information in relation thereto as will enable the Commissioner of Internal Revenue to compute the amount of the tax properly due from each corporation on the basis of an equitable and lawful accounting.

* * * * *

ART. 78. *When affiliated corporations may be required to make consolidated return.*— Whenever necessary to more equitably determine the invested capital or taxable income, the Commissioner of Internal Revenue may require corporations classed as affiliated under article 77 to furnish a consolidated return of net income and invested capital. Where such consolidated return is required it may be made by any one or more of such corporations or by all of them acting jointly; but if such affiliated corporations, when requested to file such consolidated return, neglect or refuse to do so, the Commissioner of Internal Revenue may cause an examination of the books of all such corporations to be made and a consolidated statement to be made from such examination. In cases where consolidated returns are accepted, the total tax will be computed in the first instance as a unit upon the basis of the consolidated return and will be assessed upon the respective affiliated corporations in such proportions as may be agreed among them. If no such agreement is made the tax will be assessed upon each such corporation in accordance with the net income and invested capital properly assignable to it.

Treasury Decision 2797 approved March 11, 1919):

To internal-revenue officers and others concerned:

If a corporation has before February 25, 1919, filed a return for a fiscal year ending in 1918 and paid or become liable for a tax computed under the revenue act of 1917, and is subject to additional tax for the same period under the revenue act of 1918, the return covering such additional tax shall be filed at the same time as returns of persons making returns for the calendar year 1918 are due under existing rulings, and payment of such additional tax is due in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918. If no part of the tax for such fiscal year was due until after February 24, 1919, the whole amount of tax due, including tax due under the original return and additional tax due under the amended return, will be payable in the same installments and at the same times as in the case of payments based on returns for the calendar year 1918.

U. S. GOVERNMENT PRINTING OFFICE: 1934

SUPREME COURT OF THE UNITED STATES.

No. 146.—October Term, 1934.

Clifton Manufacturing Company Petitioner, *vs.* United States of America, Respondent.	On Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

[November 5, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

A question of limitation, similar to the one considered in our opinions in Nos. 37 and 39, and in Nos. 35 and 36, comes up for decision here.

The petitioner filed a return on May 28, 1918 under the Revenue Act of 1917 for the fiscal year ending March 31, 1918. The Revenue Act of 1918 (40 Stat. 1057) became a law on February 24, 1919, with retroactive provisions as of January 1, 1918. Thereafter the petitioner filed an additional return in accordance with Treasury Decision 2797 (approved March 11, 1919 and quoted in our opinion in Nos. 37 to 39), showing an additional tax of $50,638.75. The Act of 1918 provides (§ 250d) that except in the case of fraud, "the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made." A deficiency assessment was imposed in May, 1921, which is admitted to have been timely, and another on May 26, 1926, which is contested as too late. At that time written waivers were in existence, adequate in form, which extended the date for assessment and collection until December 31, 1926. The taxpayer asserts that they were procured by misrepresentation and signed without authority, and must therefore be ignored.

In an action to recover the tax paid by the petitioner under the 1926 assessment, the District Court held (1) that irrespective of any waiver the term of limitation ran from the date of the additional return, and (2) that the waivers were valid and binding. 3 F. Supp. 508. On the authority of decisions in the Ninth Cir-

cuit (*Zellerbach Paper Co.* and *National Paper Products Co.* v. *Commissioner,* 69 F. (2d) 852, 857), the Court of Appeals for the Fourth Circuit affirmed ruling No. 1 and did not pass upon the correctness of ruling No. 2.

For the reasons stated in our opinions in Nos. 37 to 39, and in Nos. 35 and 36, the first ruling is erroneous. The second ruling we do not consider, the question of the validity of the waivers being still open for determination in the court below.

The decree should be reversed, and the cause remanded to the Court of Appeals for the Fourth Circuit for further proceedings in accordance with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.